85-1813

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

JERSEY COAST EGG PRODUCERS, INC., a corporation of the State of Delaware,

Petitioner,

vs.

LOCAL 863 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA and DOUGLAS SAMUELS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Where a labor union seeks to arbitrate the dismissal of an employee pursuant to a Collective Bargaining Agreement is the labor arbitrator collaterally estopped from relitigating the issue of the employee's guilt, previously decided by a court of law, which gave rise to the employee's discharge?

II. Does the failure of a labor arbitrator to uphold an unappealed judgment of conviction as a final and binding determination of the underlying conduct which led to the discharge of an employee constitute manifest disregard of the law requiring vacation of the labor arbitrator's award?

STATEMENT OF CORPORATE PETITIONER'S AFFILIATIONS

Petitioner is a wholly owned subsidiary of Seaboard Foods, Inc., the stock of which is owned by:

Ise America, Inc. (95%)

Mitsui and Company, Ltd. (5%).

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No.

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JERSEY COAST EGG PRODUCERS, INC., a corporation of the State of Delaware,

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vs.

LOCAL 863 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA and DOUGLAS SAMUELS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Jersey Coast Egg Producers, Inc., appellee below, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unreported and appears in Appendix A, *infra*, 1a to 19a. The opinion of the district court is unreported and appears in Appendix B, 30a-38a.

JURISDICTION

The district court possessed original jurisdiction pursuant to 29 U.S.C. §315 (Section 301 of the Labor Management Relations Act). The judgment of the court of appeals (Appendix A, 1a-19a) was entered on September 25, 1985. The court of appeals denied a petition for a rehearing on November 7, 1985 (Appendix C, 41a-42a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

9 U.S.C. §9 states, in relevant part, as follows:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an Order confirming the award, and thereupon the court must grant such an Order unless the award is vacated, modified or corrected, as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States Court in and for the district within such award was made . . . .

9 U.S.C. §10 states, in relevant part, as follows:

> In either of the following cases the United States Court in and for the district wherein the award was made may make an Order vacating the award upon the application of any party to the arbitration—. . . (d) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.

29 U.S.C. §185 (Section 301 of the Labor Management Relations Act) states, in relevant part, as follows:.

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

STATEMENT OF FACTS

9 U.S.C. §9, §10 and 29 U.S.C. §185 grant the federal courts the jurisdiction to review awards of labor arbitrators. Pursuant to paragraph D of 9 U.S.C. §10, the courts are empowered to vacate such an award in certain instances. Upon review, a court may vacate an arbitrator's award upon a showing of manifest disregard of the law. *Wilko v. Swan,* 346 U.S. 427 (1953); *I/S*

Stavborg v. National Metal Converters, Inc., 400 F. 2d 424 (2d Cir. 1974).

Manifest disregard of the law has been defined as (1) an understanding of the applicable law by the arbitrator coupled with (2) a disregard of said law by the arbitrator. *I/S Stavborg, supra; Sobel v. Hertz Warner and Company,* 469 F.2d 1211, 1214 (2d Cir. 1972); *Reynolds Securities v. Macquown,* 459 F. 2d 1211 (2d Cir. 1972).

On September 17, 1984 respondent Douglas Samuels, an employee of petitioner (hereinafter designated as "Grievant"), and the labor organization representing Grievant (hereinafter designated as "Union"), filed an action in the United States District Court for the District of New Jersey seeking to confirm a labor arbitrator's award entered on September 11, 1984. Simultaneously, the petitioner moved the Superior Court of New Jersey, Chancery Division to vacate, modify or correct this arbitrator's award. Respondents removed the latter action to the district court, which, upon its own motion, consolidated the two matters.

The district court, in ruling upon these matters, vacated the arbitrator's award based upon the arbitrator's manifest disregard of the law. Respondents appealed to the United States Court of Appeals for the Third Circuit, which reversed the ruling of the district court and reinstated the arbitrator's award.

The facts giving rise to this action may be summarized as follows. On all relevant dates, a Collective Bargaining Agreement governed the relationship between the parties (Appendix E, 51a-70a). This Agreement provided that no employee could be discharged by petitioner without "just and sufficient cause." (Appendix E, 66a). On February 27, 1984 Grievant was employed by petitioner as a driver of one of petitioner's delivery trucks.

Prior to this date, petitioner had promulgated a set of work rules mandating the automatic termination of any employee found to be stealing from petitioner or petitioner's customers. Grievant had signed these rules. On the date in question, Grievant was observed removing a sealed case of eggs from his delivery truck and placing the eggs in a vehicle which had pulled along side Grievant's truck. Upon questioning by a witness at the scene, Grievant admitted to selling the eggs to a friend.

Thereafter, upon questioning Grievant, petitioner invoked its rule mandating automatic termination of employees who steal from petitioner and terminated Grievant.

On March 14, 1984 a representative of petitioner signed a complaint in the Voorhees, New Jersey Municipal Court charging Grievant with theft of one case of eggs in violation of N.J.S.A. 2C:20-3.

Grievant was tried in the Municipal Court of Voorhees Township on April 9, 1984. At these proceedings Grievant was represented by legal counsel. Following a full trial of the issues, the court found Grievant guilty and imposed a fine and costs.

Subsequently the Union applied for arbitration of petitioner's discharge of Grievant. Prior to arbitration, petitioner moved before the Superior Court of New Jersey, Chancery Division, Ocean County, for an order enjoining arbitration of petitioner's termination of Grievant. Although refusing to enjoin the arbitration, Judge Henry H. Wiley, of the Superior Court of New Jersey, Chancery Division, Ocean County, did state that the arbitrator would be bound by the municipal court's factual determination of guilt.

This arbitration was held on July 26, 1984. At these proceedings counsel for petitioner advised the arbitrator as to the

existence of the conviction of Grievant and the determination by Judge Wiley that the unappealed conviction of Grievant in the municipal court precluded relitigation by the arbitrator of Grievant's guilt. However, the arbitrator did relitigate Grievant's guilt. The arbitrator determined that, while stealing from an employer constitutes just cause for discharge, nevertheless the arbitrator was not convinced that Grievant had committed the offense for which he had been convicted. Thus, the arbitrator ruled that the petitioner's discharge of Grievant was without just or sufficient cause. (The opinion of the arbitrator appears at Appendix D, 43a-50a.)

In vacating the arbitrator's award, the district court held that the arbitrator's refusal to accept the valid, unappealed judgment of a court, rendered after a full and fair hearing, and disposing of the precise issue being arbitrated, constituted manifest disregard of the law.

In reversing the judgment of the district court and reinstating the arbitrator's award, the court of appeals held that the district court had erred by "essentially holding that the misdemeanor conviction for theft was per se support for the discharge." (Appendix A, 9a). Based upon this belief, the court of appeals reversed the decision of the district court.

In dissenting, Chief Judge Aldisert stated that he found "the arbitrator's refusal to accept the valid, unappealed judgment of the municipal court a 'manifest disregard of the law.' " (Appendix A, 14a). In his dissent, the Chief Judge analyzed the various policy bases supporting the judicial deference normally accorded an arbitrator's award and found same to be inapplicable in the present case.

> This is not a specialized aspect of interpreting a labor contract. This is not an area calling for

> knowledge of the law of industrial shop. This is not a matter that conflicts with the informality of fact determination including the acceptance of hearsay evidence that usually characterizes an arbitration proceeding. There is nothing in familiarly stated reasons for imposing the law of issue preclusion upon judges of courts of record that should exempt labor arbitrators from adhering to this requirement.

Appendix A, 15a.

Chief Judge Aldisert continued, supporting petitioner's arguments below, that the arbitrator had improperly decided a factual issue previously determined by a court of law. The Chief Judge believed that such improper conduct on the part of the arbitrator combined with the arbitrator's statement that theft from an employer would constitute just and sufficient cause for discharge amounted to manifest disregard of the law sufficient to vacate the arbitrator's award (Appendix A, 18a).

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the power of labor arbitrators to overrule prior factual determinations by courts of law possessed with both the subject matter and in personam jurisdiction to make such determinations. The question of the collateral estoppel effect of a judgment upon a labor arbitrator has not been squarely addressed by any federal court. Furthermore the court of appeals clearly misapprehended the scope and nature of the decision of the labor arbitrator. This Court should grant certiorari to clarify that: (1) a labor arbitrator is bound by a prior factual determination of a court of law and (2) the failure of a labor arbitrator to be bound by a prior factual determination rendered by a court of law constitutes manifest disregard of the law sufficient for judicial vacation of the award.

I.

WHERE A LABOR UNION SEEKS TO ARBITRATE THE DISMISSAL OF AN EMPLOYEE PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT THE LABOR ARBITRATOR IS COLLATERALLY ESTOPPED FROM RELITIGATING THE ISSUE OF THE EMPLOYEE'S GUILT, PREVIOUSLY DECIDED BY A COURT OF LAW, WHICH GAVE RISE TO THE EMPLOYEE'S DISCHARGE.

A. This question is one of federal law which should be settled by this Court.

The matter at hand involves the confluence of the doctrine of collateral estoppel and the broad powers afforded to a labor arbitrator pursuant to the Labor Management Relations Act. This case does not involve any challenge to the arbitrator's authority to rule on the sufficient cause of a discharge of an employee by the employer. Rather, this case concerns the novel question of

whether the labor arbitrator may relitigate the question of an employee's guilt of stealing from the employer where a valid, unappealed judicial conviction for this offense exists. This controversy exposes the need for resolution of the question of the legitimacy of an arbitrator's exercise of power which attacks the domain of the judiciary. This is a question of first impression in that no federal court has been called upon to squarely resolve this issue. However, several federal courts have tangentially discussed this matter, accepting the rule that an arbitrator would be bound by the prior factual decisions in such an instance.

In *Dickinson v. Heinhold Securities,* 661 F.2d 638 (7th Cir. 1981), the court indicated the doctrine of collateral estoppel would apply to factual determinations of a court of law which are relevant to a subsequent arbitration.

> If there is a bench trial, detailed findings of fact . . . should eliminate much of the duplication through the impact of collateral estoppel on the subsequent arbitration.

661 F. 2d at 644.

In *NY State Association for Retarded Children, Inc. v. Carey,* 456 F. Supp. 85 (E.D.N.Y. 1978), the court stated:

> Our research has uncovered only one instance where a judicial decision takes precedence over an otherwise applicable contractual provision. This occurs when relitigation of a point is barred by the doctrines of res judicata and collateral estoppel.

456 F. Supp at 96.

Similarly, in *Telephone Workers Union v. NJ Bell Telephone*

Co., 450 F. Supp. 284 (D.N.J. 1977), *aff'd*, 584 F. 2d 31 (3rd Cir. 1981) the court put forth the proposition that a union could not attack a prior, valid consent decree via the arena of labor arbitration. Rather, the court held the arbitrator bound by the decree.

The policy supporting judicial deference to an arbitrator's award mandates resolution of this issue by this Court. As this Court stated in *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960) the arbitrator is chosen so as to be part of the parties' system of self-government; he is chosen for his "knowledge of the common law of the shop."

In this case, however, the common law of the shop is not at issue. Despite this, the decision of the court of appeals extends the arbitrator's authority beyond the scope previously contemplated by courts construing same. The result is a direct conflict between the arbitrator and the authority of the judiciary of a state to make a factual and legal determination of guilt, a sphere in which the judiciary is by far the more experienced. "The labor arbitrator performs functions which are not normal to the court; the considerations which help him fashion judgments may indeed be foreign to the competence of the courts." *United Steelworkers v. Warrior and Gulf Navigation Co., supra*, 363 U.S. at 581. Conversely, the facts of this matter call for a judicial recognition that a prior factual and legal determination of guilt is an appropriate and traditional function for courts. This Court's construction of the relationship between the judiciary and labor arbitrators does not permit a labor arbitrator to usurp the power and role of a court of law in the fashion accomplished by this arbitrator. The municipal court conviction is binding upon any federal or state judge in a subsequent civil proceeding. (Appendix A, Dissent of Chief Judge Aldisert at 15a). There exists no reason to refrain from according the same preclusive effect in a subsequent labor arbitration. The results of such a determination should be

binding upon, and accepted by, labor arbitrators.

Similarly, the arbitrator's award does not draw its essence from the Collective Bargaining Agreement. The award is, therefore, invalid. *W.R. Grace and Co., v. Local Union 759, International Union of United Rubber Workers of America,* 461 U.S. 757 (1983); *United Steelworkers v. Enterprise Wheel and Car Corporation,* 363 U.S. 593 (1968). It is clear that the parties, upon entering into the Collective Bargaining Agreement (Appendix E, 51a-70a) did not intend to convey upon the arbitrator the power to overturn this, or any, judicial decision. Rather, the agreement contemplated that the arbitrator would resolve only the question of whether Grievant's prior conviction constituted just and sufficient cause for dismissal pursuant to that agreement. However, the court of appeals failed to recognize this distinction; the court allowed the arbitrator to decide legal issues beyond the scope of the Collective Bargaining Agreement and the arbitrator's powers. Such a result is contrary to this Court's construction of the powers of a labor arbitrator.

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

United Steelworkers v. Enterprise Wheel and Car Corporation, supra, 363 U.S. at 597.

Here, the decision of the court of appeals allows the arbitrator

to "dispense his own brand of industrial justice." Neither the parties to the Collective Bargaining Agreement, nor the courts, in fashioning the general policy of judicial deference to such opinions, contemplated such a result.

B. The decision of the court of appeals constitutes a departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

The court below resolves this matter as if it involved an attack on the authority of the arbitrator to interpet the Collective Bargaining Agreement and thereby resolve disputes.

The court of appeals states:

> As this court noted in a similar context, 'once it is conceded that the arbitrator had the power to make a just cause determination, the district court is not free to review the merits of that determination' (citations omitted).

Appendix A, 7a.

However, the issue presented to this Court and the court below does not involve a "just cause determination." The arbitrator's opinion and award states, at Appendix D, 48a, "Stealing from an employer (or a customer of employer) is an offense, which, if proven, clearly warrants summary discharge . . . . When it occurs, just cause exists for discharge." However, the arbitrator refused to enforce the valid, unappealed conviction of Grievant for an offense which, according to the arbitrator's own opinion, warrants summary discharge.

Thus, it is clear that the matter at hand requires a determination of whether the arbitrator's conduct constitutes

manifest disregard of the law. However, the court of appeals failed to resolve this issue, instead relying upon the mistaken belief that the case involves the power of a labor arbitrator to interpret a contract. As can be seen, the court below failed to provide the parties with a studied determination of their controversy. Such conduct by the court of appeals renders its decision a departure from the accepted and usual course of judicial proceedings. Clearly, this Court should exercise its power of supervision so as to provide an adequate and accurate determination of the issue presented by the circumstances of the arbitration involving these parties.

CONCLUSION

The question of whether a labor arbitrator is collaterally estopped from relitigating a judicial determination of guilt has never been squarely resolved by the courts. The court of appeals failed to resolve this question in its decision. This issue presents important and far reaching implications for the effective administration of labor arbitrations governed by the National Labor Management Relations Act. For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A—OPINION OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5869

LOCAL 863 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA and DOUGLAS SAMUELS,

Appellants

v.

JERSEY COAST EGG PRODUCERS, INC.,
a corporation of the State of Delaware,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Nos. 84-3869, 84-4211)

Submitted under Third Circuit Rule 12(6)

August 8, 1985

Before: ALDISERT, *Chief Judge*,
STAPLETON and MANSMANN,
Circuit Judges

(Filed September 25, 1985)

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Appendix A

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OPINION OF THE COURT

MANSMANN, *Circuit Judge*

This appeal requires the court to decide whether an order of the district court vacating an arbitration award is error. We find that, given the limited scope of review over arbitration decisions afforded the courts, the district court erred in vacating the award. We reverse the district court and reinstate the arbitration award.

I.

On February 27, 1984, a customer reported observing appellee's delivery truck driver, Douglas Samuels, make an unauthorized sale of one case of eggs to an unidentified person. Approximately one week later, although its records did not evidence a loss of eggs, the appellee discharged Mr. Samuels for theft. The appellee stated in its "Employee Warning Report" notifying Mr. Samuels of his immediate termination: "We have been advised that on 2/27/84 you were seen selling eggs off your delivery truck to an unauthorized individual. This is against company policy." Appendix.

at 1a. The appellee had implemented a set of written rules and operating procedures for drivers in August of 1981. One of these rules, rule 13, provides in part: "The driver will be terminated immediately if the following events occur. 1. Stealing from the company or its customers." *Id.* at 227a. The appellant union filed a grievance pursuant to the parties' collective bargaining agreement protesting Mr. Samuels' discharge.

In addition to discharging Mr. Samuels, the appellee pursued a criminal complaint in the Municipal Court of Voorhees Township, alleging theft of the eggs which were valued at $35.00. Following a nonjury trial on April 9, 1984, Mr. Samuels was found guilty of the misdemeanor and was ordered to pay a $50.00 fine, $25.00 in costs, and $25.00 to the Violent Crime Compensation Board. No appeal from the criminal conviction was taken.

The grievance filed by the appellant union proceeded through the various stages of review and was scheduled for arbitration on July 26, 1984. On July 12, 1984, the appellee filed a complaint in the Superior Court of New Jersey, Chancery Division, seeking a temporary restraining order on the arbitration and a declaratory judgment providing that no arbitrable issue exists as to the validity of the discharge. On July 24, 1984, the Superior Court refused to restrain the arbitration.[1]

An arbitration hearing was conducted as scheduled on July 26. In an Opinion and Award issued September 11, 1984, the arbitrator set aside the discharge, holding "that the Grievant did not violate

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1. Subsequent to the issuance of the arbitrator's award on September 11, 1984, the Superior Court of New Jersey dismissed the appellee's action seeking declaratory judgment.

the Company rule in paragraph 13 *and* that there was no just or sufficient cause for the discharge of the Grievant." *Id.* at 173a (emphasis in original).

On September 17, 1984, the appellant union filed a petition to confirm the arbitration award in the United States District Court. On the following day, the appellee filed a motion to vacate the award in the Superior Court of New Jersey, Chancery Division. This action was removed by appellants to the district court pursuant to 28 U.S.C. § 1441. The appellants alleged that the action involved section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and sections 9 and 10 of the United States Arbitration Act, 9 U.S.C. §§ 9 & 10. The petition to confirm and the motion to vacate the arbitration award were consolidated in the district court.

The appellee subsequently moved to remand the motion to state court, and the appellants moved to amend their petition to confirm so as to invoke section 301 of the LMRA. The appellants' motion to amend was granted on November 29, 1984. On December 3, 1984, the district court heard oral argument on the appellee's motion to remand and on the cross-motions to confirm and to vacate the arbitration award. In an opinion issued from the bench, the district court denied appellee's motion to remand. The court granted appellee's motion to vacate and denied appellant union's petition to confirm. The court reasoned that the arbitrator's decision exhibited manifest disregard for the law by ignoring the collateral estoppel effect of the misdeameanor conviction. The Court issued the appropriate order on December 5, 1984. Before this court is an appeal of that order.

II.

This court must decide whether the district court exceeded the permissible bounds of its scope of review

in setting aside the arbitration award. In essence, we must review the district court's conclusion that the arbitrator exhibited manifest disregard for the law by refusing to accord dispositive preclusive effect to Mr. Samuels' misdemeanor conviction for theft. Because this issue involves the interpretation and application of legal precepts, our review is plenary. *Universal Minerals Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 101-02 (3d Cir. 1981).

At the outset we note that the district court's scope of review over the arbitration award is narrowly circumscribed. Parties who include an arbitration clause in their collective bargaining agreement "choose to have disputes concerning constructions of the contract resolved by an arbitrator." *W. R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757, 764 (1983). A court must defer to an arbitrator's decision "so long as it draws its essence from the collective bargaining agreement." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) ("*Enterprise Wheel*"). "[A] federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one." *W.R. Grace & Co.*, 461 U.S. at 764 (quoting *Enterprise Wheel*, 363 U.S. at 596). Nor may a court disturb an arbitrator's award because it finds an error of law. *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953). The Supreme Court of the United States has noted:

> As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact." . . . cannot be examined.

Id. at 436. An award may be set aside only in limited circumstances, for example, where the arbitrator's decision evidences manifest disregard for the law rather than an erroneous interpretation of the law. *Id.*

The collective bargaining agreement between the appellant union and the appellee sets forth a procedure for the filing of grievances and for submission of disputes to arbitration at the request of either party. *See* Appendix, at 221a-222a. The issue submitted to the arbitrator in the instant action is set forth in the Opinion and Award:

> Was the discharge of Douglas Samuels, the Grievant, for just and sufficient cause pursuant to the terms of the Collective Bargaining Agreement? If not, what shall be the remedy?

Id. at 169a. Presumably, resolution of that issue involved the arbitrator's interpretation and application of Paragraph 21 of the Collective Bargaining Agreement entitled "*Discharge of Employees.*" *Id.* at 222a. Paragraph 21 provides:

> No employee shall be discharged by the Employer except for just and sufficient cause. When an Employee is discharged the Employer shall notify the Union by Registered Mail within five (5) days after the discharge and state the reasons for the discharge. If the Union, in any case, contends that an employee was discharged without just and sufficient cause, then and in that event the validity of said discharge shall be submitted to Arbitration in the manner provided for in Pararaph "18". In the event the Board of Mediation determines that an Employee was discharged without just and sufficient cause, said Employee shall be reinstated with full pay for all time lost by him from work as a result of said discharge.

Id. The arbitrator "reviewed and weighed carefully all of the testimony and evidence offered at the hearing, including the post hearing transcript" and concluded that "[t]he discharge of Douglas Samuels, the Grievant, was not for just and sufficient cause pursuant to the terms of the Collective Bargaining Agreement." *Id.* at 174a (Arbitrator's Opinion and Award).

In light of the agreement between the parties, the issue submitted to the arbitrator, and the arbitrator's conclusion, this court finds that the district court impermissibly set aside the arbitrator's award. As this court noted in a similar context, "once it is conceded that the arbitrator had the power to make a just cause determination, the district court is not free to review the merits of that determination." *Super Tire Engineering Co. v. Teamsters Local Union No. 676*, 721 F.2d 121, 125 (3d Cir. 1983), *cert. denied*, 105 S.Ct. 83 (1984). The Supreme Court has warned the federal courts not to review the reasoning of the arbitrator.

> Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement.

Enterprise Wheel, 363 U.S. at 598. So long as it draws its essence from the collective bargaining agreement, an arbitrator's award must be enforced absent a showing of "[f]raud, partiality, misconduct, violation of a specific command of law, or vagueness rendering enforcement impractical." *Super Tire Engineering Co.*, 721 F.2d at 124 n.5 (citing *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 n.27 (3d Cir. 1969)), or

a showing that enforcement would be contrary to public policy. *W.R. Grace & Co.*, 461 U.S. at 766.

The district court, recognizing that in this case only a "manifest disregard" of the law would warrant the setting aside of the arbitrator's award, held that "the arbitrator's refusal to accept the valid, unappealed judgment of a court of this state [the misdemeanor conviction], rendered after a full and fair hearing, and disposing of the precise issue being arbitrated, constituted manifest disregard for the law." Appendix, at 211a-212a. The district court, however, erred in applying the principle of collateral estoppel so as to void the arbitrability of the issue submitted to the arbitrator.

We need not reach the issue of whether an arbitrator was bound by the doctrine of collateral estoppel in the circumstances of this case or in any such case at this time.[2] Assuming, *arguendo*, that this doctrine of collateral estoppel precludes relitigation of the factual issue of theft, it remains within the arbitrator's purview to interpret the impact of such a finding in the context of the particular collective bargaining relationship in question. The court may not reevaluate supposed inconsistencies in the arbitrator's logic or review the merits of the arbitrator's decision.[3] *See Super Tire Engineering Co.*, 721 F.2d at

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2. The case law is far from clear on this issue. While the district court held that the law requires application of the doctrine of collateral estoppel in arbitrations, we question that proposition in light of recent comments contained in decisions of the Supreme Court of the United States. *See* Dean Witter Reynolds Inc. v. Byrd, 53 U.S.L.W. 4222, 4224 & n.9 (March 4, 1985); McDonald v. City of West Branch, 52 U.S.L.W. 4457, 4459 (April 18, 1984); Kremer v. Chemical Construction Corp., 456 U.S. 461, 477-78 (1982).

3. The district court ignores this principle when it holds that given the arbitrator's finding "that the company rule allowing

125. It remains the decision of the arbitrator, and the arbitrator alone, whether the misdemeanor conviction constitutes just cause for the dismissal under the terms of the collective bargaining agreement.

The district court impermissibly imposed its own interpretation of the collective bargaining agreement by essentially holding that the misdemeanor conviction for theft was *per se* support for the discharge. Such a decision ignores the possibility that an arbitrator may interpret the contract in a different manner and find a lack of "just and sufficient cause" for a discharge for theft despite the misdemeanor conviction. This is especially true where, as here, the discharge occurred one month *prior* to the conviction. It cannot be said that Mr. Samuels' discharge was an issue that was "strictly a function of management" or an issue removed from the scope of arbitration. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584 (1960). The collective bargaining agreement clearly calls for arbitration of *any* disputed discharge. The work rule warning that theft from the employer or from a customer will result in a discharge does not supercede the agreement to arbitrate.

In *Super Tire Engineering*, this court addressed a factual context similar to that at bar. In that case, the collective bargaining agreement provided for immediate dismissal of employees found drinking alcoholic beverages during work hours. *Super Tire Engineering*, 721 F.2d at 122. Nonetheless, an arbitrator reinstated an employee discharged for violation of the drinking rule. *Id.* at 123. The arbitrator found that the "just cause" clause of the collective

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discharge for theft was proper under the collective bargaining agreement." appendix, at 205a, the misdemeanor conviction requires approval of the discharge.

bargaining agreement applied to the "immediate dismissal" for drinking provision and held that the discharge of the grievant lacked just cause because the employees, and the discharged employee in particular, had not received sufficient warning of the automatic sanction of discharge. *Id.* This court refused to permit the setting aside of that award, reasoning that "[i]n the absence of an unambiguous provision in the agreement mandating dismissal or removing an arbitrator's review function, we will not set aside an arbitrator's decision to review a dismissal in light of the mix of factors that make up just cause." *Id.* at 125.

Similarly, in *Arco-Polymers, Inc. v. Local 8-74*, this court held that a district court erred in vacating an arbitration award where the arbitrator had reinstated an employee absent for more than four days without "good and sufficient cause" despite a provision of the collective bargaining agreement stating that such persons "shall be subject to discharge." 671 F.2d 752, 753-54 (3d Cir. 1982). This court found that an opinion and award which "might be viewed as confusing and subject to various interpretations" should not be set aside so long as one of those interpretations would support a finding that the award draws its essence from the contract. *Id.* at 756-57. The interpretation accepted by the *Arco-Polymers* court was that "[i]n a proper case an arbitrator . . . may construe a 'just cause' provision of a labor contract to include a progressive discipline requirement and may determine that certain conduct is 'just cause' for discipline but not for discharge." *Id.* at 756 (quoting *Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692, 695 (10th Cir. 1977)). This court concluded that "it would not necessarily have been inconsistent for the arbitrator to have found that [the discharged employee] had no 'good and sufficient cause' for his absences but that the Company had no

'just cause' to discharge him." *Arco-Polymers, Inc.*, 671 F.2d at 756.

In the instant litigation, the arbitrator interpreted the employer's burden of proof, stating:

> That discharge [of Mr. Samuels], however, whether prohibited by an established work rule or by generally accepted contractual notions, must be judged by the standards attached to the effective collective bargaining agreement. That standard herein, and as stated above, is by clear and convincing evidence supporting the allegations and a factual finding thereof. Such a factual determination has not been reached by the Arbitrator in the instant matter.

Appendix, at 173a. As the Supreme Court of the United States noted in *Wilko v. Swan*, the arbitrator's conception of matters such as the burden of proof may not be reexamined by the courts. 346 U.S. at 436. The instant arbitrator found that the employer had not met its burden of proof because it failed to establish proof of loss and failed to accord the process due a twenty-five year employee. Appendix, at 173a. It is a permissible interpretation of the award to say that the arbitrator decided that, by the terms of the agreement and under the facts of the case, a misdemeanor conviction was not just cause for dismissal. Such an interpretation suggests that the award draws its essence from the parties' agreement and may not be set aside. *See Sun Petroleum Products Co. v. Oil, Chemical and Atomic Workers International Union, Local 8-901*, 681 F.2d 924, 928 (3d Cir. 1982) ("when an arbitrator's opinion is subject to varying interpretations, a court may not deny enforcement of the arbitrator's award as long as one interpretation of the opinion suggests the award does draw its essence from the parties' agreement") (citations omitted).

"The short answer to [the employer's] contentions is that [it] agreed to leave to an arbitrator the resolution of disputes whether [just] cause existed for the discharge of any employee represented by [the union]. The arbitrator has ruled, and [the employer] is bound by that award." *Mobil Oil Corp. v. Independent Oil Workers Union*, 679 F.2d 299, 304 (3d Cir. 1982). Neither this court nor the district court may substitute its interpretation of the collective bargaining agreement and the collateral estoppel effect of the misdemeanor conviction for the decision of the arbitrator on the issue submitted to arbitration pursuant to the parties' agreement. It is for the arbitrator and not for the court to decide whether a misdemeanor conviction supports a discharge under the terms of the collective bargaining agreement. *Cf. W.R. Grace & Co.*, 461 U.S. at 765-66 n.8 (court not permitted to interpret clause specifying that state and federal laws supercede the collective bargaining agreement).

III.

We find that the district court erred in holding that the arbitrator's award evidenced a manifest disregard for the law. Consequently, we will reverse the district court and will reinstate the award of the arbitrator.

STAPLETON, *Circuit Judge*, Concurring:

I agree that the arbitrator's award must be enforced. I write separately to emphasize what for me is the crucial fact of the matter: the arbitrator understood the parties to have bargained for his decision rather than for that of the Municipal Court.

Although the arbitrator in this case was aware of the fact finding done by the Municipal Court, he construed the collective bargaining agreement as

calling for him to determine independently both what the employee had done and whether his conduct constituted "just and sufficient cause." Given the fact that the agreement provided for an arbitral, rather than a judicial, resolution of discharge issues, it cannot be said that this interpretation of the arbitrator failed to draw "its essence from the collective bargaining agreement." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). This means, in my view, that the district court was bound to enforce the award unless it could be said that the collective bargaining agreement, as construed, was contrary to law or against public policy.

While appellee has cited some case law supporting the proposition that the doctine of collateral estoppel can properly be applied in an arbitration context, we have been referred to no authority suggesting that a collective bargaining agreement which insists on an arbitrator's resolution of fact issues despite the existence of judicial fact finding is either contrary to law or against public policy. Given that the failure to apply collateral estoppel in this context involves no additional burden on public, judicial resources, I perceive no reason why management and labor should not be free to bargain about this matter.

ALDISERT, *Chief Judge*, Dissenting.

Douglas Samuels was convicted of stealing from his employer, Jersey Coast Egg Producers, Inc., which had fired him for the theft. He did not appeal the conviction. Yet, according to Arbitrator Pierson, he should not have been fired because he was not guilty and, moreover, the company has to rehire him and award him backpay.

District Judge Thompson said in effect that this

was nonsense and refused to enforce the arbitrator's award. The majority disagree and reverse. I dissent. I would affirm because, like Judge Thompson, I find the arbitrator's refusal to accept the valid, unappealed judgment of the muncipal court a "manifest disregard for the law." App. at 212a.

I.

The case of *Ludwig Honold Manufacturing Co. v. Fletcher*, 405 F.2d 1123 (3d Cir. 1969), is controlling. Speaking for the court in that opinion, I set forth two fundamental precepts to guide labor arbitrators and the courts that review their awards: first, an arbitrator must never act in "manifest disregard" of general law; second, because the parties have bargained for the arbitrator's interpretation of the labor contract, the arbitrator's award will be sustained so long as the interpretation is based on some principles of contract construction and the law of the shop.[1] I made clear,

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1. My precise language follows:

> [T]his means that the interpretation of labor arbitrators must not be disturbed so long as they are not in "manifest disregard" of the law, and that "whether the arbitrators misconstrued a contract" does not open the award to judicial review.
>
> Accordingly, we hold that a labor arbitrator's award does "draw its essence from the collective bargaining agreement" if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award.

405 F.2d at 1128 (footnotes omitted).

however, both in the text of the opinion, and in a footnote, that in addition to cases where the arbitrator totally departed from principles of contract construction, "[a]n award may be vacated where it . . . violates a specific command of some law . . . ." 405 F.2d at 1128-29 n.27 (citing cases). That is precisely what the arbitrator did here.

II.

Here we have a criminal conviction in which Samuels was convicted by proof beyond a reasonable doubt. I cannot conceive of any subsequent civil proceeding before any Article III judge, including a Supreme Court justice, or before any federal magistrate, bankruptcy judge, or state judge, in which the judicial officer would not be bound by the previous determination. The reason for this is that the proof in the criminal proceeding (beyond a reasonable doubt) is a higher burden than the subsequent civil case. The same is not true, however, where the person is acquitted in the criminal proceeding. The judicial officers in the subsequent civil case may reexamine the facts because the burden of proof is of a lesser degree (usually, preponderance of the evidence).

The question then comes, if a U. S. Supreme Court justice is bound by the law of issue preclusion by a previous criminal case, is there any satisfactory reason to exempt a labor arbitator from following the same law? I think not. This is not a specialized aspect of interpreting a labor contract. This is not an area calling for knowledge of the law of the industrial shop. This is not a matter that conflicts with the informality of fact determination including the acceptance of hearsay evidence that usually characterizes an arbitration proceeding. There is nothing in familiarly stated reasons for imposing the law of issue preclusion upon judges of courts of record that should exempt labor arbitrators from adhering to this requirement.

Moreover, it would seem that imposing issue preclusion on a labor arbitrator where a criminal case precedes the arbitration is a matter of *a fortiori* proportions especially, as here, where an arbitrator has chosen to re-invent the facts of the criminal conviction and the crime under which the employee was charged and found guilty.

III.

It is uncontroverted that Arbitrator Pierson was informed that Douglas Samuels "did commit the theft of company property on February 27, 1984 *as determined by the Voorhees Township Municipal Court.*" App. at 44a (emphasis supplied). It is also uncontroverted that the criminal information in that court charged that Samuels

> did within the jurisdiction of this court, commit an act of theft upon Jersey Coast Egg Producers by unlawfully taking and exercising control over certain movable property, to wit: one case of eggs valued at $35.00 belonging to another with the intent to deprive the owner thereof; in violation of: NJS 2C:20-3.

App. at 2a. Chapter 20 of the New Jersey Code of Criminal Justice is titled "Theft and Related Offenses". Section 2C:20-3 provides:

> **2C:20-3. Theft by unlawful taking or disposition**
>
> **a. Movable property.** A person is guilty of theft if he unlawfuly takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof.
>
> **b Immovable property.** A person is guilty of theft if he unlawfully transfers any interest in immovable property of another with purpose to benefit himself or another not entitled thereto.

The transcript of the Municipal Court proceedings reveals:

> THE COURT: [T]he testimony of [the witness] is one without interest, and he just impresses this court of having very unemotionally testifying this is what he saw and that is what he said, and that is what he heard.
>
> On the other hand, the testimony of the Defendant, obviously has an interest. His interest is his job, which this Court is not unmindful of, and the implication of the consequences of this action, and he comes to Court and denies each of the allegations and statements by Hartman.
>
> The testimony would seem to indicate that the Defendant did, while making a delivery, take a case of these eggs, and cause it to be passed over to someone else, not on his delivery route, and it would seem to this court that the State has carried its burden beyond a reasonable doubt.
>
> I am saddened by making this decision, his job is on the line. Apparently the Court has no alternative but to enter a finding of Guilty.

App. at 34a.

Notwithstanding that the criminal information was based on the New Jersey criminal statute for theft, the arbitrator commented: "Moreover, the Union maintained that the conviction was for disorderly persons, not theft." *Id.* at 171a. As a lawyer, the arbitrator should know that the New Jersey grading criteria for the theft of an amount under $200.00, imposing a sentence equal to that of disorderly persons does not change the legal conclusion of theft. *See* N.J. Stat. Ann. § 2C:20.2(b) (West 1982).

The majority state that they need not reach the issue of collateral estoppel, assuming *arguendo* that it would apply, because it would still be the decision of the arbitrator as to whether the "misdemeanor conviction constitutes just cause for dismissal under the terms of the collective bargaining agreement." I fully agree that the arbitrator has the final say as to the legal conclusion of what constitutes just cause under the collective bargaining agreement. The arbitrator clearly addressed this issue stating that theft would constitute just cause: "Stealing from an employer . . . is an offense which, if proven, clearly warrants summary discharge. It is conduct which should not nor cannot be condoned by the parties to the collective bargaining relationship. When it occurs, just cause exists for discharge." App. at 173(a).

Notwithstanding this clearly proper legal conclusion, the arbitrator instead decided to rewrite the factual history of the case before him. Although Samuels was convicted beyond a reasonable doubt of stealing a crate of eggs from his employer, the arbitrator concluded: "[T]his arbitrator has not been convinced that [Samuels] did commit the act of theft on February 27, 1984." *Id.*

In my view, a more blatant disregard of the law by an arbitrator is very difficult to imagine. The arbitrator clearly stated that theft constitutes just cause for discharge. But with regard to the factual issue of theft itself, the arbitrator completely ignored a record showing that Samuels had already been convicted of that same theft. This is "manifest disregard" of the law of issue preclusion. This "violates a specific command of some law." As such, his award should be vacated. *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1129 (3d Cir. 1969).

Appendix A

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B—OPINION AND ORDER OF DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil Action No. 84-3869

LOCAL 863, I.B.T.,

Petitioners,

vs.

JERSEY COAST EGG PRODUCERS, INC.,
Respondent.

Trenton, New Jersey
December 3, 1984

MOTION

Transcript of Proceedings

B E F O R E:

THE HONORABLE ANNE E.THOMPSON, U.S.D.J.

Appearances:
Messrs. ZAZZALI, ZAZZALI & KROLL
By: KENNETH I. NOWAK, ESQ.,
For the Petitioners

Messrs. ROTHSTEIN, MANDELL & STROHM
By: JOHN F. GELSON, ESQ.,
For the Respondent

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[2] THE COURT: *Local 863 v. Jersey Coast Egg Producers.*

Mr. Nowak, looking at this, stepping back a bit from the proceedings which preceded our considerations today, did plaintiff have a change of mind as to what positions he would be taking with regard to his job status?

MR. NOWAK: No, your Honor. If you are referring to the reasons why he proceeded to defend himself in the municipal court?

THE COURT: And then did not take an appeal. If you read what the kind of discussion between the attorney for the defendant in the municipal court and what was said in mitigation of sentence, and so on, I just was trying to read between the lines.

MR. NOWAK: You don't have to really read between the lines. We were told by Mr. Samuels he was given a $50 fine in the municipal court and his attorney told him it would cost between $500 and $1,000 to prosecute the appeal, and his attorney at the time was not a Labor Board attorney and certainly was not our firm and was possibly unaware of the ramifications of the decision for his job in which case even a thousand dollars for an appeal would have been insignificant. It surely should have been expended.

It's one of the harsh realities of life out there. People who are found guilty of these offenses represented by criminal attorneys, they are given $50 fines. They say [3] that's all I can afford. I have to pay my counsel for this. I can't afford an appeal, and they are never advised as to the potential ramifications to their job. There is no other reason for it. There is no mystery to it, your Honor.

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THE COURT: All right. I have been through what's been submitted here. I'm not sure this case is a particularly difficult motion circumstance. If you feel there is something you would like to emphasize, feel free to do so at this time. But you may be confident that we have considered what has been submitted.

MR. GELSON: May it please the Court, just about one issue your Honor has raised today concerning whether or not, which appears to be the argument the union wasn't aware of the ramifications of Mr. Samuels' appearing in court and potential appeals.

I think it should be noted the incident occurred February 27th. The employee was discharged on March 6th. The conviction was April 9th. There was quite a time period when the union was aware of the possible ramifications and I think to put the brunt as it appears to be attempted here today on the attorney in a criminal matter is unfair.

There was the possibility of an appeal *de novo* to the Superior Court and our rules also allow a motion to file an appeal late. No such motion was made. I think it's unfair to say the employee and the union were not aware the [4] entire time of the ramifications.

The transcript revealed that defense counsel, the Court and Mr. Samuels were all aware at that time of the ramifications. That's the only point I would like to address, Judge.

THE COURT: Anything else you would like to touch upon?

MR. NOWAK: I'll be very brief.

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What I would like to do is have a two-or three-sentence quote from an arbitration decision, because we believe this arbitration decision from 1973 is typical. It's from the *Alden's Inc.* case at 61 Labor Arbitrations B.N.A. 663. It's a 1973 case and I will quote perhaps two sentences from that. This involved a relationship between a conviction in criminal court and an arbitration arising out of the same set of facts.

> "Even an employee discharged for theft is entitled to have his grievance considered in an arbitration proceeding whether he was found innocent or guilty of the same offense by a criminal court. An arbitrator is not bound by the judgment in a criminal proceeding or by an administrative agency." And it gives the citation. "Whether an employee was discharged for just and proper cause is a matter to be decided from the nature of employee/employer [5] relationship, from contract provisions, from proper rules of conduct and from established and accepted practices."

THE COURT: Which case is that you are citing?

MR. NOWAK: *Aldens, Inc.*, 61 Labor Arbitrations B.N.A., 663 at 665.

THE COURT: Is that a District Court or an Appellate Court of Appeals?

MR. NOWAK: This is simply an arbitration decision and it refers to three other arbitration decisions, your Honor.

Appendix B

THE COURT: Do you have a Federal Appeals Court case saying that?

MR. NOWAK: I'm unaware of any judicial decision going the opposite way, saying that an arbitrator must apply a criminal conviction.

THE COURT: Do you have one saying —

MR. NOWAK: What we do have, some of the cases that we cited but *Alexander v. Gardener-Denver* line of cases, that decision and its progeny, that established that there is an unbridgeable gap between arbitrations and the judicial forum. In those cases — also, this is the law in the State of New Jersey.

The Supreme Court of New Jersey has recently ruled on this similar to the Supreme Court of the United States. [6] Where you have an employee who was found — who raised discrimination cases in an arbitration and also pursues them under Title VII or 1983, the fact they may lose their case in an arbitration has no bearing on their Title VII or 1983 actions.

THE COURT: I agree with you wholeheartedly. Indeed, I tried a case right here in this court where I charged the jury the arbitration finding is totally separate and apart from the considerations and the plenary consideration the jury is to give to the Title VII claim of the plaintiff. Here we are talking about something like collateral estoppel.

Do you have anything to show that, any precedent for what you are seeking here, where a conviction in a state court representing findings of fact and conclusions of law, where the arbitrator is free to make completely new findings of fact and conclusions of law in the case of this conviction?

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MR. NOWAK: Your Honor, I would submit the *W.R. Grace* case decided by the United States Supreme Court does speak along those lines. In that case you had an EEOC agreement which I believe was enforced by a Federal District Court and then you had a subsequent arbitration, and the arbitrator said no, the company still violated the collective bargaining agreement despite the existence of the Federal District Court order and the EEOC consent agreement. The [7] Supreme Court of the United States upheld the arbitration award because arbitration decisions, it said, do not have to take into account the existence of any laws or Federal orders. It is a totally separate self-contained process.

THE COURT: That's the closest you can get?

MR. NOWAK: We also have these arbitration decisions which I just read to you. I'm unaware of any decisions which go the opposite way. This is how arbitrators rule. This is how arbitration exists and the courts have not told us otherwise, at least not yet.

I believe the reasoning of *Alexander v. Gardner-Denver* and some of the lower court decisions I cited in the brief that I will not repeat here also indicate the same thing. This is a 1973 decision I read from. It refers to other arbitration decisions going back many years.

I cited a case in my brief which was from a well-established arbitration text, Fairweather Text on Practice and Procedure in Arbitration. There are no decisions I'm aware of that say that is impermissible. It is simply a totally separate forum and they take into account totally separate issues.

Collateral estoppel simply does not apply in the arbitration setting, whether it be from a court decision or previous arbitration.

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THE COURT: Suppose it's the same issue, guilt of [8] theft?

MR. NOWAK: It doesn't apply. They are simply separate beings. There is no relationship. As my adversary pointed out correctly, where you have an administrative agency plus judicial proceedings, there will be *res judicata* and collateral estoppel effects between the administrative hearing and court decisions, because both are under statutes, both are under regulations promulgated by state official government.

Here you are in a totally separate non-regulated world of the collective bargaining agreement, and I believe our quotation from the U.S. Supreme Court in our brief indicates that, that arbitrators apply only the collective bargaining agreement based on the facts they decide to hear. They are not bound by any other decisions.

In *W.R. Grace* the Supreme Court said they are not bound by EEOC content agreements. They are not bound by Federal orders. In *Alexander v. Gardener Denver* in the Title VII progeny from that they established a clear separation between the judicial process and arbitration process.

The arbitration decisions that I just quoted to you, all of these indicate the arbitrator hears the facts and decides the matter under the collective bargaining agreement. As a matter of fact, this same arbitrator emphasized in discussing the relationship.

[9] He said, "No criminal proceeding may be submitted to an arbitrator whose selection and whose authority is derived solely from the provisions of a collective bargaining agreement. A penalty for engaging in a criminal act involves imprisonment and/or a fine prescribed by statute or ordinance. An arbitration proceeding

involves an alleged violation of one or more contractual provisions, the interpretation and application of these provisions, the alleged violation of a long-established and accepted practice or any act deriving out of the employer/employee relationship. And this is true in an issue of employee termination."

I submit to you, your Honor, there is simply no support for imposing *res judicata* into the arbitration process. This will have dramatic impact on arbitrations. What we will now have is employers coming in or unions coming in with *res judicata* arguments, with collateral estoppel arguments, with suppression of evidence arguments.

Your Honor, what if we have a criminal case in which the evidence is thrown out because defendant makes a motion to suppress evidence and there is no conviction and then at an arbitration the company says: we discharged this person because they did such-and-such and this is our evidence, and the defense would say: Mr. Arbitrator, you can't hear that because a court made a ruling suppressing that [10] evidence because it resulted from an illegal search and seizure? The entire arbitration process is going to be refashioned.

THE COURT: Why? People know that a determination of constitutionality of a search is not the same considerations as whether or not a person did or did not do a certain act which may be a violation of the contract. Issues aren't the same.

MR. NOWAK: But what this does is bring into a process which was supposed to be totally self-contained, expeditious, informal, without all the trappings of the judicial forum or even the administrative procedure forum and slowly but surely what we are going to have here is a sub-link to the judicial process

in the arbitration process, a relationship which has never shifted to this day. There is no support for this.

Our adversary cites no support for this. All the arbitration cases go against it. There is no support for it. Surely, the spirit, if not the letter of the *Gardener-Denver* and *W.R. Grace* cases and Fifth Circuit cases and other lower court cases would militate against applying these type of doctrines into — whether the companies like it or not it's a totally self-contained informal process where arbitrators can hear things decided by other agencies or decided by other courts.

[11] Believe me. It would have ramifications well beyond this decision for arbitration process, ramifications I don't think the courts intended.

THE COURT: I have not found, and maybe I overlooked something, I have not found anything other than the New York Times article.

MR. NOWAK: That was an arbitration case. That's not an article. It just happened to involve the New York Times.

THE COURT: The language on page 8 of your brief?

MR. NOWAK: Yes, your Honor.

THE COURT: You haven't cited me an Appellate Court case anywhere which seems to be applicable to this situation where we're talking about a finding of theft. Aren't there incidents fairly often where you have a contract where that's the kind of offense that can justify a dismissal of an employee who was tried in the state courts somewhere?

Appendix B

MR. NOWAK: Just the other day I had three of these cases involving the United States Postal Service. We represent the mailhandlers. These are cases in which these people were convicted for crimes off duty, off work, ranging from possession of controlled dangerous substances to firearms and —

MR. GELSON: Judge, this isn't proper, this kind of argument. I think counsel is testifying.

[12] THE COURT: He's giving me examples. But they don't seem like the examples on point now that I'm listenting to them.

MR. NOWAK: There the Circuit Courts in previous cases, the Federal Courts of Appeals have issued the correct standards in these cases where there are people convicted of crimes and the union sought to arbitrate. What the Courts of Appeals have stated is that in order for the conviction itself to support the discharge, the company — in all the cases they were the Federal Government operated — must show a nexus between the conviction and the person's work performance.

THE COURT: That's another issue.

MR. NOWAK: It certainly shows a conviction is not *res judicata* to the discharge. The fact there is no appellate case supporting our decision directly, there is likewise no court decision, Appellate decision going against us. What we are left with then is a *tabula rasa* as far as a direct case immediately on point. All we have before us are a series of arbitration cases, all of which — I cited four to you in total. There are more. All four say that a conviction in a criminal court is not *res judicata* in an arbitration.

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Admittedly, these are arbitration cases. There are no court cases reversing that proper position. That is a [13] proper position of industrial labor relations and has been for many, many years. It's cited in Fairweather Practice and Procedure in Labor Arbitration. It is also, although not directly on point again, I submit to you the intent of the *Gardener-Denver, W.R. Grace* decisions is that is to create a wall between arbitrations and the judicial forum so that the arbitrations continue to be an extremely informal self-contained procedure.

There are no cases going against us and this would be a vast alteration in the history of labor relations. I cited this case. There are three, the *Aldens* case, and there are three other cases cited in it. There is the *New York Times* case. There are other arbitration cases. I do not know of any directly on point going against us.

THE COURT: Thank you, very much.

The parties come before the Court for a determination of the validity of an arbitration order by which Douglas Samuels was reinstated to his job as a driver for Jersey Coast Egg Producers, Inc. ("the company"). Local 863, International Brotherhood of Teamsters ("the union") moves for confirmation of the arbitration award. The company moves for vacation of the award, arguing that the arbitrator's decision was in "manifest disregard of the law." The company also raises jurisdictional issues.

The union filed a Verified Petition to Confirm [14] Arbitration Award in this court on September 17, 1984 (Civ. No. 84-3869). The company filed a notice of motion before the Superior Court of New Jersey, Chancery Division, requesting vacation, modification and/or correction of the arbitration award. Upon

removal of that action to this court (Civ. No. 84-4211), the two actions were consolidated.

The underlying factual dispute arose on February 27, 1984, when Samuels, a 25 year employee of Jersey Coast, made a delivery of eggs to an Acme Market. An assistant manager of Acme allegedly observed Samuels place a box of eggs (valued at about $35) into the trunk of a car. The witness reportedly confronted Samuels, and insisted that Samuels admitted to stealing the eggs for resale to a friend.

The witness contacted the company, and it discharged Samuels pursuant to its rule which provides for the discharge of any employee who steals from the company or a customer of the company. On April 9, 1984, Samuels was found guilty of stealing the eggs in Voorhees Township Municipal Court, before the Honorable Joseph Nardi, Jr., J.M.C. He was fine $50. Samuel was represented by counsel in the criminal action, and did not appeal the judgment.

Samuels filed a grievance with the union upon his discharge. On July 12, 1984, Jersey Coast moved in the Superior Court of New Jersey, Chancery Division, for an order restraining the arbitration. The company argued, in [15] effect, that Samuels' conviction for theft of the eggs disposed of the matter, that the company was clearly within its rights in discharging him, and that there remained no issue for arbitration. The motion was denied on July 24, 1984, apparently because the union asserted that the rule upon which the company relied was not properly a part of the collective bargaining agreement.

Arbitration proceedings were held on July 26, 1984. At that time, the arbitrator examined the facts of the case, including the

terms of the collective bargaining agreement, the company rules, and the conviction for theft in the Municipal Court. The arbitrator also heard testimony regarding the events of February 27.

The arbitrator found that the company rule allowing discharge for theft was proper under the collective bargaining agreement. He did not, however, end the inquiry there. Although he was made aware of the criminal conviction, he conducted an evidentiary hearing as to Samuels' guilt.

After hearing the same witnesses who had testified before the Municipal Court, the arbitrator concluded that the company had not established the theft, stating that "it is impossible for this Arbitrator to sustain a discharge on unconvincing identifications or a misdemeanor conviction." (Arbitrator's Opinion and Award, p. 6) He awarded Samuels [16] reinstatement with back pay. It is this Opinion and Award, dated September 11, 1984, which is the subject of the motions before the Court today.

There are two issues before the Court today. First, the company contends that this Court does not have jurisdiction over No. 84-4211, because it was improperly removed from state court. Second, the company asserts that the arbitrator's award must be vacated as a manifest disregard of the law because it failed to give collateral estoppel effect to the criminal conviction.

The petition for removal of the company's action invoked this Court's jurisdiction pursuant to 28 U.S.C. §1441. That section grants removal jurisdiction to this Court over any action over which there would have been original jurisdiction. There would have been original jurisdiction over this matter pursuant to 29 U.S.C. §185 (§301 of the Labor Management Relations Act) which provides in part:

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> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction over the parties, without respect to the amount in controversy or without regard [17] to the citizenship of the parties."

See, Kallen v. District 1199, 574 F.2d 725 (2d Cir. 1978) ("Since federal courts indisputably have jurisdiction under section 301 to *enforce* a labor arbitration award [cites omitted], we agree with the district court that suits to *vacate* awards are cognizable under the same statute.") The company argues, however, that it did not invoke §301 in its pleadings, and therefore its action involves only state law questions and federal jurisdiction is lacking on removal. This argument is unpersuasive. The company may not avoid federal questions related to matters of labor-relations merely by omitted mention of the National Labor Relations Act in its pleadings. It is fundamental that this dispute involve federal question jurisdiction in that the suit seeks determination of disputed terms of a collective bargaining agreement, and therefore removal was proper. *See, Minot Builders Supply Ass'n v. Teamsters Local 123*, 703 F.2d 327 (8th Cir. 1983).

The other issue before the Court is whether the arbitration award should be vacated because the arbitrator failed to give collateral estoppel effect to the criminal judgment. The union argues that the award was rationally derived from the contract, and so must be confirmed. The company argues that the failure to bar relitigation of the issue was an error of law which requires a finding by this [18] Court that the arbitrator exceeded his powers.

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In reviewing whether the arbitrators exceeded their powers, the Court must look to the agreement to arbitrate to determine those issues which the arbitrators can decide. *Amerada Hess Co. v. Local 22026, supra. United Steelworkers v. Enterprise Wheel and Car Co.*, 363 U.S. 593 (1960). Doubts regarding the scope of coverage are resolved in favor of arbitration. *Kurt Orban v. Angeles Mutual Systems,* 573 F.2d 739 (2d Cir. 1978). This Court will not, however, vacate an arbitration award because it misinterprets the contract. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 n.4 (1956). *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424 (2d Cir. 1974) ("We see no basis, however, to reverse the award even though it is based on a clearly erroneous interpretation of the contract." p. 432), *Amerada Hess, supra.* As the Supreme Court has stated, "It is the arbitrator's construction [of this contract] which was bargained for, and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overriding him because their interpretation of the contract is different." *Enterprise Wheel, supra,* at 599.

Errors in law or fact by the arbitrators will not justify vacating the award. *Wilko v. Swan,* 346 U.S. 427 (1953), *Sperry International Trade v. Government of Israel,* [19] 689 F.2d 301 (2d Cir. 1982), *Ludwig Honald Manufacturing v. Fletcher,* 405 F.2d 1123 (3d Cir. 1969). An award shows a "manifest disregard" for the law not upon a showing of legal error; there must be a "perverse misconstruction" of the law in order to vacate an award. *Ludwig Honald, supra,* p. 1128, *Sperry International, supra.* In short, an award will only be vacated "if the reasoning is so palpably faulty that no judge, or group of judges, could ever conceivably have made a ruling, then the Court can strike down the award. [Footnotes omitted] But where it is not that gross, the arbiter's error—even though on an issue on which the reviewing

court would have arrived at a different decision--does not ipso facto make the arbiter an outlaw or his erroneous action a matter outside the scope of the agreement to arbitrate, in excess of the terms of the submission or beyond his powers as an arbiter." *Safeway Stores v. American Bakery and Confectionery Workers,* 390 F.2d 79, 82-3 (5th Cir. 1968). Where there is even "a barely colorable justification for the outcome reached, confirmation of the award cannot be prevented by litigants who merely argue, however persuasively, for a different result." *Andros Compania Maritime v. March Rich Co.,* 579 F.2d 691, 704 (2d Cir. 1978).

In deciding this question, then the Court first must decide whether the arbitrator erred as a matter of law in his ruling, and second must determine whether such error [20] was in manifest disregard of the law.

This Court must look to the law of New Jersey in determining whether the prior conviction should bar relitigation of the issue of the theft. *New Jersey-Philadelphia Presbytery v. New Jersey State Board of Higher Education,* 654 F.2d 868, 876 (3d Cir. 1981). New Jersey law bars relitigation of issues "distinctly put in issue" and "directly determined" against the party sought to be estopped. *Id.* This state does not limit the application of this doctrine to situations in which the party asserting the bar was a party to the prior action. The broader statement of estoppel, contained in the Restatement, Judgments 2d, § 29 (1980) has been adopted by the courts of this state. *Allesandra v. Gross,* 187 N.J. Super. 96, 104 (A.D. 1982) § 29 states:

> "A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked a full and

> fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue."

It is clear that facts determined pursuant to a criminal conviction may preclude further relitigation of those facts. *New Jersey Manufacturers Insurance Co. v. Brower,* 161 [21] N.J. Super. 293, 297 (A.D. 1978) ("a criminal conviction can bar the person convicted and his privies as to an issue of fact necessarily determined by the conviction. . . .")

In this case, the Municipal Court found Samuels guilty of the theft. This judgment obviously required a finding of fact identical to that upon which the company rested its decision to discharge Samuels. Samuels was represented, and had the opportunity and motive to contest the charges in Municipal Court. He also was entitled to appeal the conviction if he considered it to be incorrect. He is therefore estopped from reopening the issue, and it was an error of law for the arbitrator to allow him to do so. *New Jersey Manufacturers v. Brower, supra.*

A mere error of law, however, does not provide this Court with reason to disturb the arbitrator's order. *Wilko v. Swan, supra.* This Court must go on to determine whether the arbitrator exhibited a manifest disregard for the law. The arbitrator was made aware of the conviction for theft in Municipal Court. In addition, he found that the rule allowing discharge for theft from the company or a customer was proper in relation to the collective bargaining agreement.

I find that the arbitrator's refusal to accept the valid, unappealed judgment of a court of this state, rendered after a full and fair hearing, and disposing of the [22] precise issue being

arbitrated, constitued manifest disregard for the law. The arbitrator, on page 6 of his Opinion, notes the findings of the Municipal Court, but finds it "impossible" to sustain the discharge on the basis of a "misdemeanor conviction." He thus knowingly considered and rejected the dispositive findings of a court of this state. This failure goes beyond mere error, and reaches the level of "perverse misconstruction" of the law as described in *Ludwig Honald Manufacturing v. Fletcher, supra.*

The union argues that arbitration is neither judicial nor "quasi-judicial," and that the judge-made doctrine of collateral estoppel does not apply to it. Their argument is interesting in so far as it rests on an analysis of the purposes behind arbitration. Referring to the reasoning of *Alexander v. Gardener-Denvear Co.*, 415 U.S. 36 (1974), the union asserts that the arbitrator must base his decision on the "law of the shop," and so it would be beyond the arbitrator's power to acquiesce in the judgment of the state courts.

This analysis, however, must take into account the superior, overarching position of the courts of the state, in this case a municipal court. The union must concede that the arbitrator is bound by the criminal law of New Jersey, and therefore it cannot escape the conclusion that he is also bound by the interpretation of that law by this state's [23] courts. Once Samuels' conviction became final, it was the law of the State of New Jersey that he was guilty of theft, and found so lay beyond a reasonable doubt standard.

Furthermore, it is not a novel idea that arbitrators are bound to recognize the factual findings in a court of competent jurisdiction. *See, e.g., Dickinson v. Heinhold Securities, Inc.*, 661 F.2d 638, 644 (7th Cir. 1981). The union's argument to the contrary

is that the parties to the collective bargaining agreement contracted for this informal decision-making process, and should not be allowed to import extrinsic fact-finding into the process. Surely neither the union nor the company, when signing the agreement, expected the decisions to be made in a legal vacuum. The company was entitled to expect the protection of the finality afforded it under New Jersey law in this case. The arbitrator here decided as "no judge, or group of judges, could ever conceivably have decided." *Safeway Stores, supra,* at 82.

For the reasons which I have stated plaintiff's motion to confirm the arbitration award is denied, defendant's motion to dismiss and remand is denied, and defendant's motion to vacate that arbitration award is granted. The Court will enter its own order.

Thank you very much, gentlemen.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 84-3869

LOCAL 863, I.B.T.,

Plaintiff

v.

JERSEY COAST EGG PRODUCERS, INC.,

Defendant

ORDER

This matter having been opened by respondent on an application to dismiss the action for want of jurisdiction of the subject matter, or in the alternative for vacation of the arbitration award, and by plaintiff on an application to confirm the arbitration award, the parties having appeared by their respective attorneys, and the court having reviewed the moving and opposing papers and for good cause shown; it is on this 5th day of December 1984,

ORDERED that defendant's motion to dismiss the action for lack of jurisdiction be and hereby is denied; and it is further

ORDERED that defendant's motion to vacate the arbitration award dated September 11, 1984, be and hereby is granted; and it is further

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ORDERED that plaintiff's motion to confirm the arbitration award dated September 11, 1984, be and hereby is denied.

s/ Anne E. Thompson

ANNE E. THOMPSON, U.S.D.J.

APPENDIX C - DENIAL OF PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5869

LOCAL 863 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA and DOUGLAS SAMUELS,

Appellants

v.

JERSEY COAST EGG PRODUCERS, INC., a corporation of the State of Delaware,

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, *Circuit Judges*

The petition for rehearing filed by appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

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By the Court,

s/ Carol Los Mansmann
Circuit Judge

Dated: November 7, 1985

APPENDIX D — OPINION AND AWARD

NEW JERSEY STATE BOARD OF MEDIATION

Case No. 83-1045

In the Matter of Arbitration Between

JERSEY COAST EGG PRODUCERS, INC.
and
LOCAL 863, IBT

The undersigned was appointed by the New Jersey State Board of Mediation as Arbitrator of the dispute described herein.

The hearing was scheduled for June 14, 1984 but postponed at the request of the Company upon assertion that the matter was not arbitrable. The matter was heard at the hearing held July 26, 1984 at the law offices of Rothstein, Mandell & Strohm, Lakewood, New Jersey. The parties were afforded full and fair opportunity to present their respective positions as to the agreed to issue submitted to the Arbitrator for final and binding decision. A transcript of the stenographic notes was prepared from the testimony at the hearing and a copy was supplied to the Arbitrator.

Appearances for the Company:

Charles H. Mandell, Esq.
Rothstein, Mandell & Strohm
Irwin Mowdy, Assistant General Manager
Steven Hartman, Witness

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Appearances for the Union:

Andrew F. Zazzali, Esq.
Zazzali, Zazzali & Kroll
John Braeden, Business Agent
Douglas Samuels, Grievant

ISSUE: Was the discharge of Douglas Samuels, the Grievant, for just and sufficient cause pursuant to the terms of the Collective Bargaining Agreement? If not, what shall be the remedy?

BACKGROUND:

Jersey Coast Egg Producers, Inc. (the Company) and Local 863, IBT (the Union) are parties to an effective Collective Bargaining Agreement (the Agreement), entered into the record of the hearing as Joint Exhibit J-1. The Company is engaged in the production and sale of eggs and egg products, including the delivery by truck. Douglas Samuels was a truck driver for the Company.

The matter herein arose from the *discharge of Douglas Samuels* (the Grievant) *by the Company on March 6, 1984 for violating Company work rules prohibiting "stealing from the company or its customers"*. Specifically, the Company maintained that an "Immediate Termination Effective 3/6/84" was issued in an Employee Warning Report stating:

> We have been *advised that on 2/27/84 you were seen selling eggs off your delivery truck to an unauthorized individual. This is against company policy.* (see Company Exhibit C-7).

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According to the Company, the Grievant, a delivery driver was observed removing a case of eggs from a Company delivery truck and placing that case of eggs in a vehicle which had pulled up alongside the truck. The Company maintained that the Grievant was confronted by the individual observing the act (an assistant store manager at the delivery location) and, when questioned as to the act, the Grievant admitted that he was selling the eggs to a friend.

The Company contended that the Grievant violated the known and established work rule prohibiting theft of company goods, as specifically referred to in paragraph 13 of the Company Rules (See C-1) and by his conduct, gave rise to immediate termination. (See C-7).

Moreover, upon notification by the Acme employee, a complaint was filed in municipal court (Voorhees Township) and the *Grievant was subsequently found guilty of theft.* The Company maintained that the *conviction supported the Company's action of discharging Mr. Samuels.*

It was the Company's position that an employee who steals could not be retained by an employer nor was an employer required to employ an individual who steals. Moreover, the Company contended that no mitigating circumstances existed herein to excuse the Grievant's conduct.

The Company requested the Arbitrator to deny the grievance and to sustain the discharge.

The Grievant *denied the* theft of Company goods and *denied placing a carton of eggs in a car on the date alleged.* The Union contended that the Company *failed to demonstrate that goods*

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were stolen or that the delivery location complained of a *shortage* on the date which the theft was to have occurred. Moreover, the Union maintained that the individual claiming to have observed the theft *never checked the delivery for a shortage* nor *properly identified the Grievant.*

In addition, the Union contended that the Grievant was not confronted by the Company until a week after the alleged occurrence, making the charges more difficult to refute, and demonstrating that the discharge was decided prior to the confrontation.

In respect to the municipal court conviction, the Union contended that the *discharge occurred before the adjudication* of charges and that therefore the *discharge could not be supported by a subsequent conviction.* Moreover, the Union maintained that the *conviction was for disorderly persons, not theft.*

The Union requested the Arbitrator to reinstate the Grievant with backpay and all benefits.

OPINION:

The discharge of an employee for theft requires *serious and careful consideration of an arbitrator in* review of the record and decision therefrom. In performing those responsibilities, an arbitrator *must consider the rights of the parties,* specifically, *the right of an employer to promulgate rules and regulations in order to operate an efficient and productive business, free from theft by employees,* and the right of an *employee to receive due and proper process for alleged misconduct.*

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In the instant matter, this *Arbitrator has been asked to determine whether, in fact, an employee had "placed a sealed carton of eggs into a car" after having taken the merchandise from his delivery truck.*

In this respect, the *burden of persuasion rests* with the Company to prove by *clear and convincing evidence* that the *Grievant committed the act alleged* and, thus, gave the Company just and sufficient cause for discharge.

Central to the determination herein is that of credibility of the *conflicting testimonial statements* in respect to the occurrence of the February 27, 1984 incident alleged by the Acme store manager.

It is generally held that it is within the province of the arbitrator to determine the weight, relevancy and authenticity of evidence. In arriving at the truth, the arbitrator must consider whether conflicting statements ring true or false; he will note the witnesses' demeanor on the stand; and he will credit or discredit testimony according to his impressions of the witnesses' veracity. In other words, the duty of this Arbitrator is simply to determine the truth respecting material matters in controversy, as he believes it to be, based upon a full and fair consideration of the entire evidence and each piece of documentary evidence, the weight, if any, to which he honestly believes it to be entitled.

Despite the *earnest testimony* of the assistant store manager, it is difficult for this Arbitrator to believe that an individual, engaged in the act of stealing (or selling) eggs from his truck would do so at the location of a delivery; that the "eye witness" who is also the assistant store manager would observe a theft, report the theft, but never check the delivery for possible shortages; and

that the ownership of the car and the license, in which the carton was allegedly placed, were never positively identified. Moreover, this Arbitrator is puzzled by the lack of determining what, if anything, was stolen and from whom it was stolen.

Stealing from an employer (or a customer of an employer) is an offense which, *if proven, clearly warrants summary discharge.* It is *conduct which should not nor cannot be condoned by the parties to the collective bargaining relationship. When it occurs, just cause exists for discharge.*

That discharge, however, whether prohibited by an established work rule or by generally accepted contractual notions, *must be judged by the standards attached to the effective collective bargaining agreement.* That standard herein, and as stated above, is by clear and convincing evidence supporting the allegations and a factual finding thereof. *Such a factual determination has not been reached by the Arbitrator in the instant matter.*

The employer, when contending that an employee has stolen or committed theft, *must support that allegation by proof of loss.* Herein, there was no proof of loss. Moreover, when *considering that Mr. Samuels had spent over twenty-five years in the employ of the Company, there should have been produced more than a vague identification, specifically a definite description, of what was stolen.* Without such, it is impossible for this Arbitrator to sustain a discharge on *unconvincing identifications or a misdemeanor conviction.*

Based on the evidence presented, this Arbitrator has *not been convinced that the Grievant did commit the act of theft on February 27, 1984.* As such, *based on this finding,* this *Arbitrator must hold that the Grievant did not violate the Company rule*

in paragraph 13 and that there was no just or sufficient cause for the discharge of the Grievant.

Therefore, this Arbitrator shall order *reinstatement of* Douglas Samuels to his employment as delivery driver with the Company. The Company shall *reinstate the Grievant to his employ, effective the date of this Award, and make the Grievant whole* for lost wages and benefits. The backpay award shall be *reduced by the amount of outside earnings earned by the Grievant during the period of discharge,* including *payments received from unemployment insurance.* The *payment to* the Grievant shall be made within a reasonable time, *not to exceed thirty days* from the date of this Award.

In conclusion, it is here noted that the Arbitrator has reviewed and weighed carefully all of the testimony and evidence offered at the hearing, including the post hearing transcript, even though many facets of these have not been referred to in this Opinion. In the Arbitrator's considered judgment all the evidence and arguments of the respective parties, on balance, permit no other decision than sustaining of the Union's grievance.

In consonance with the proof and upon all of the foregoing, the undersigned Arbitrator hereby finds, decides, determines, and renders the following:

AWARD

1. The discharge of Douglas Samuels, the Grievant, was not for just and sufficient cause pursuant to the terms of the Collective Bargaining Agreement.

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2. The Company shall reinstate Douglas Samuels to his employment position with the Company and make the Grievant whole as per the above Opinion.

September 11, 1984

s/ J. J. Pierson
J. J. Pierson, Esq.
Arbitrator

State of New Jersey

County of Essex

On the 11th day of September, 1984 before me personally came and appeared J. J. Pierson, Esq., to me known and known to me to be a person described herein who executed the foregoing instrument, and he acknowledged to me that he executed the same.

s/ Helen R. Ludwig
HELEN R. LUDWIG
Notary Public of New Jersey
My Commission Expires
November 18, 1985

APPENDIX E — COLLECTIVE BARGAINING AGREEMENT

***UNION COPY — LAKEWOOD EGG INDUSTRY

THIS AGREEMENT, BY AND BETWEEN: JERSEY COAST EGG COMPANY HEREINAFTER REFERRED TO AS THE "EMPLOYER" AND "COMPANY" AND LOCAL UNION 863, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, HEREINAFTER REFERRED TO AS THE "UNION".

W I T N E S S E T H

THE COMPANY HEREBY AND HEREWITH, recognizes the UNION as the authorized Collective Bargaining Agent for all Employees covered under this Agreement, who are employed as Drivers, Trailer Drivers, Straight Jobs and Helpers on Trucks during the Term of this Agreement.

THIS AGREEMENT, shall also apply to all present and future Employees employed by the Company as Drivers, Trailer Drivers, Straight Jobs and Helpers on Trucks during the Term of this Agreement.

1. UNION SECURITY

It shall be a condition of employment that all employees of the Employer covered by this Agreement who are Members of the Union in good standing on the effective date of this Agreement, or the execution date, whichever is later, of this Agreement become and remain Members in good standing in the Union. It shall also be a condition of employment that all employees covered by this Agreement, and hired on or after its effective date, whichever is later, shall on the thirtieth (30th) day following the beginning

of such employment become and remain Members in good standing in the Union.

The failure of any person to become a member of the Union at the required time shall obligate the Employer, upon written notice from the Union to such effect and to the further that Union Membership was available to such person on the same Terms and Conditions generally available to other members, to forthwith discharge such person. Further the failure of any person to maintain his Union Membership in good standing as required herein shall upon written notice to the Employer by the Union to such effect, obligate the Employer to discharge such person.

In the event of any change in the law during the Term of this Agreement, the Employer agrees that the Union will be entitled to receive the maximum Union Security which may be lawfully permissible.

No provisions of this Article shall apply in any state to the extent that it may be prohibited by State Law. If under applicable State Law additional requirements must be met before any such provision may become effective, such additional requirements shall first be met.

If any provision of this Article is invalid under the Law of any State wherein this Agreement is executed, such provision shall be modified to comply with the requirements of State Law or shall be renegotiated for the purpose of adequate replacements. If such negotiations shall not result in a mutually satisfactory Agreement, the Union shall be permitted all legal or economic recourse.

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2. PICKET LINE

It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a primary Labor dispute, or refuses to go through or work behind any Primary Picket Line, including the Primary Picket Line of the Unions party to this Agreement and including Primary Picket Lines at the Employer's places of Business.

3. EXTRA EMPLOYEES

Extra Employees, i.e., employees hired on a daily basis shall be guaranteed at least eight (8) hours or its equivalent in pay in any day such employee is requested to report for work and shall be paid the overtime rate for every hour worked in excess of eight hours.

4. SATURDAY AND SUNDAY WORK

Any Employee requested to report for work on a Saturday shall be paid premium pay at time and one-half.

Any Employee requested to report for work on a Sunday and reporting for work shall receive a minimum of four hours pay at the double time rate and all work performed on a Sunday up to eight hours shall be paid at the double time rate. Hours worked in excess of eight hours shall be paid for at the triple time rate.

5. STARTING TIME

Any Employee's starting time to be computed from the time

of the Employee's arrival at the garage or terminal to leaving same. Time Clocks shall be used in all cases where practical. When it is not practical to have a Time Clock, Time Cards shall be used.

6. WILDCAT STRIKES

In the event that the Employee, at any time during the Term of this Contract, shall engage in a wildcat strike, stoppage of work or similar concerted activities which have not been authorized nor ratified by the Union, the Union, its Officers, and Members shall not be liable in damages and the Employer agrees that he will not institute any action or other proceedings in any court or in any forum against the Union, its Officers or Members on account thereof.

7. WAGES 11/21/82

TRAILER DRIVERS: $6.29

STRAIGHT JOBS: $6.19

HELPERS ON TRUCKS: $5.92

There will be a Wage Opener on 11/21/84 for the last two (2) years of the Contract only.

Trailer Drivers, Straight Jobs, Helpers on Trucks: All Categories to receive Wages for a forty hour week, plus an additional eight hours guarantee, at Time and One-half.

8. WELFARE FUND

For the objects and purposes set forth in the Local Union

Appendix E

863 Agreement and Declaration of Trust, executed between certain Employers and the Union, and any amendments or supplements, thereto all of which are incorporated herein by reference; the Employer shall pay to the Local Union 863 Welfare Fund the sum of FORTY DILLARS [sic] ($40.00) per week for each Full Time Employee covered by this Agreement. The Employer shall continue to pay the aforesaid sum of FORTY DOLLARS ($40.00) per week for each employee notwithstanding the fact that an employee may be out of work due to illness or injury. The said contributions shall continue on behalf of any sick or injured Employee up to a maximum of six months. Payment for newly hired Employees shall be from the first day of employment.

The Trustees of the Welfare Fund shall have the right to receive, collect, demand, sue and institute proceedings in any court or other tribunal for the purpose of enforcing payment of any of the contributions required to be made under this Agreement. If the Employer is delinquent in the payment of contributions to the Welfare Fund, the delinquent Employer shall be further obligated to pay to the Welfare Fund all costs of collection and attorney fees. When litigation is required the delinquent Employer shall be obligated to pay to the Fund all costs of collection, court costs, attorney fees and interest and any other expenses incurred by the Trustees in enforcing or attempting to enforce payment of any of the contributions required to be made under this Agreement.

Employees sho [sic] are in steady and continuous service and while in the employ of an Employer making contributions to the Fund shall be eligible to participate in the benefits provided for and purchased by the Fund after they have been so employed for the period of time specified by the Welfare Plan. If any employee qualified to participate in the Benefits provided for and

purchased by the Fund shall cease to qualify due to lack of Employer contributions or for any other reason whatsoever he and his dependents rights to share in any benefits whatsoever, purchased and provided for by the Welfare Fund shall forthwith cease and terminate. Whatever reasonable expenses are necessary in the discretion of the Trustees, to maintain and administer the Fund shall be paid out of the Fund. No Employee shall have the option to receive instead of the benefits provided for by the said Welfare Fund, any part of the amounts contributed by the Employer to the Fund, and no employee shall have the right to assign any benefits to which he or his dependents may be entitled under a cash consideration in lieu of the benefits established by the Fund either upon termination of the Fund created or through severance of his employment or otherwise.

Title to all monies paid in the said Fund shall be vested in and remain exclusively in the Trustees and it is the intention of the Parties hereto that said Fund shall constitute an irrevocable trust and that no benefits or monies payable from this Fund shall be subject in any manner to alienation, sale, transfer, assignment, pledge, encumbrance or change and any attempt to do so shall be void. The monies paid into said Fund shall not constitute or be deemed wages to the individual employee nor shall said monies in any manner be liable for or subject to the debts, contract, liabilities or torts of any of the Employees or Parties entitled to such money, that is, any of the Benefits provided for under the Terms of this Agreement.

Failure of the Employer to pay wages and fringe benefits called for in this Agreement, shall be cause for strike or stoppage of work without resorting to the grievance procedure, anything in this Agreement to the contrary notwithstanding. The Employer agrees that if the cost of the Health and Welfare Insurance is

increased the Employer shall bear the increased coverage cost, upon notice by the Union of such increase, by remitting sufficient monies to the Fund, for said cost in addition to the regular contributions for each Employee.

9. HOLIDAYS

The following shall be considered as Holidays within the meaning of this Agreement to wit:

NEW YEAR'S DAY	LABOR DAY
LINCOLN'S BIRTHDAY	COLUMBUS DAY
WASHINGTON'S BIRTHDAY	ELECTION DAY
DECORATION DAY	VETERAN'S DAY
INDEPENDENCE DAY	THANKSGIVING DAY

CHRISTMAS DAY

Also, any Holiday called for by the State.

MARTIN LUTHER KING DAY
FEBRUARY.

(A) The Employees covered by this Agreement, for work performed on a Holiday shall be paid at the rate of time and one-half for first eight hours worked, after eight hours work the employees shall receive triple time pay for overtime hours worked; also in addition to receive eight hours straight time pay for Holiday.

(B) Employees working on Sundays shall be paid at the rate of double time for eight hours, after eight hours work the rate of pay is triple time for overtime work.

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(C) Any Employee covered by this Agreement working three days in any calendar week if work is available, during which any of the above listed Holidays occurs, but who is not ordered for work on the Holiday, shall nonetheless, receive one days pay for the Holiday at the straight time rate. This shall also apply if the Holiday falls on Saturday.

(D) Any Employer covered by this Agreement, working three nights in any calendar week during which any of the above listed Holidays occurs, but who is not ordered to work on the Holiday, shall nonetheless receive one days pay for the Holiday at the straight time rate. This shall also apply if the Holiday falls on Saturday.

10. SHOP STEWARD

The Union shall have the right to appoint or select an employee (member of the Union) of the Employer if the Employer employs twenty (20) or more men to act as a Shop Steward for the purpose of seeing that the conditions of this Agreement are not broken by either the Employee or the Employer and under no circumstances shall he be discriminated against. Any employee acting as Steward shall not be paid additional or extra compensation therefore, but shall only receive the wages as provided in this Agreement for the type of work he performs. If the employment of one acting as Steward has terminated, the Union has the right to select another employee to act in his place and stead. The one acting as Steward shall be the last one to be laid off during the dull or slack seasons of the year.

11. LAY OFFS

The Employer agrees to give one week notice to the Employees in the event of a Lay Off.

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12. SENIORITY

(A) The principal of the Seniority shall prevail at all times. Whenever it becomes necessary for the Employer to reduce the number of Employees in his employ, the Employee last hired shall always be laid off first and when rehiring takes place, the Employee last laid off shall be the first to be rehired.

(B) The following rules shall govern the exercise of Seniority rights by the Employees of the Employer and the Members of the Local Union Party to this Agreement:

1. Definition of Seniority

(A) Company or Payroll Seniority is defined as the Seniority which the employee acquires from his earliest date of hire in the Company as a whole.

(B) Terminal Seniority is defined as the Seniority which an Employee acquires from his earliest date of hire at a specific Terminal or Branch of the Company.

2. Opening New Branches

When a new Branch or Terminal is opened at any location the Employer shall offer to all employees covered by this Agreement the opportunity to transfer to the new Branch or Terminal in the order of their Company or Payroll Seniority. The transferred Employee shall, for a period of thirty (30) days following the transfer, have an unqualified right to return to their old Terminal and carry with them their Seniority at that old Terminal.

3. Closing of Branches

(A) When a Branch or Terminal is closed and the work of the Branch or Terminal is eliminated, an Employee who was formerly employed at another Branch or Terminal shall have the right to transfer back and exercise his Seniority based on the date of hire at the Branch or Terminal into which he is transferring.

(B) When a Branch or Terminal is closed and the work of the Branch or Terminal is transferred to another Branch or Terminal, an employee employed at the closed down Branch or Terminal shall have the right to transfer to the Branch or Terminal into which the work was transferred and to exercise his Seniority on a Company or Payroll basis.

4. Merger

When two or more Companies merge their operations then the Employees of the respective Companies shall all be placed on one Seniority roster in the order of the earliest date of hire on each of the Employees with their respective Employer.

5. Acquisition or Purchase

When one Company acquires or purchases control of the Business of another Company then the Employees of the Company so acquired or purchased shall be placed at the bottom of the acquiring or purchasing Company's Seniority roster in the order of their payroll or Company Seniority with the former Company.

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6. I.C.C.

The report of the Interstate Commerce Commission shall be considered as presumptive proof as to the nature of the transaction relative to mergers, purchases, acquisitions and/or other combinations of two or more Contract or common Carriers.

7. Disputes Procedure

If a dispute arises concerning the interpretation or application of the foregoing provisions dealing with Seniority then the subject matter of such dispute may be taken up by the aggrieved Party under the grievance and arbitration procedure as provided for herein.

13. LOSSES IN DELIVERIES

Chauffeurs or Drivers shall make deliveries as required, except that they shall not be held responsible for losses occurring in making deliveries, except all necessary precautions shall be provided.

Any Employee leaving his Truck or Automobile for night tie-up or storage in a different place than he started from, shall be paid car fare. If the Employee ties up at any other point, he shall be paid traveling time and transportation expenses. Any employee sent outside the Metropolitan District shall be paid Hotel and Traveling expenses.

14. UNION FUNCTIONS

Any Member of the Union who is required to attend a Union Convention or perform any other function on behalf of the Union,

necessitating a leave of absence not in excess of seven days, not more often than once a year, shall upon application being made be granted said leave of absence by his Employer and upon completion thereof, he shall be immediately reinstated by the Employer to his original job without loss of Seniority together with any increase in regard to pay, which may have become effective in his absence, and together with all other privileges, emoluments and immunities pertaining to said job. The Officials of the Union and the Shop Steward shall always have the right of access to the premises of each Employer for the purpose of transacting necessary Union Business provided the Employer or his authorized Representative is present on such premises.

15. LUNCH HOURS

Every Driver shall receive at least one hour off for lunch each day, as near the middle of the day as possible, as are all employees covered under this Agreement.

16. DEATH LEAVE

It is agreed that three (3) days absence from work with pay, as a mourning period, upon the death of an employee's wife, child, husband, father, mother, brother, or sister, will be granted. Upon death of mother-in-law and father-in-law the Employee shall be allowed one day.

17. VACATIONS

Any Employee who has completed one year of service with the Employer shall receive one (1) week vacation with pay.

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Employees who have completed two years of service with the Employer shall receive two (2) weeks vacation with pay.

Employees who have completed three years of service with the Employer, shall receive three (3) weeks vacation with pay.

Employees who have completed twelve years service with the Employer shall receive four (4) weeks vacation with pay.

The Pay for Vacations shall be made in cash and in advance of the Vacation.

In determining Vacations, all days paid for, except those allowed for Vacations, shall be counted as days worked. In addition work days lost through Workmen's Compensation claims are to be considered days worked, provided the Employee has worked at least sixty days in the yearly Vacation qualifying period. The Employer shall post the Vacation schedule no later than March 15, of each year. The Vacation period shall be any time during the Calendar year. Vacations shall be scheduled in accordance with Seniority, provided that the number of employees scheduled at one time and the number of consecutive weeks granted an employee, shall be at the discretion of the Employer and at no time will Vacations be granted if it interferes with the efficient operation of the Business. When an Employee takes his Vacation during a Holiday Week, he shall be paid for the said Holiday, in addition to his Vacation Pay or receive an extra day off with pay with his Vacation. It is understood however, that the number of men permitted their Vacation during a Holiday Week, shall not exceed the number of men who are permitted to take their Vacation during a Non-Holiday Week. Vacations shall be earned and fully accrued on the date the Employee becomes qualified by the length of Service required under this Agreement. Any

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Employee who has qualified for a Vacation and whose employment is severed for any reason whatsoever, shall receive at the time of the severance of employment, vacation Wages pro-rated on the number of days worked since his last qualifying period.

18. GRIEVANCE PROCEDURE AND ARBITRATION

If a dispute arises concerning the interpretation or application of the foregoing provisions dealing with Seniority or application of the foregoing provisions dealing with Seniority then the subject matter of such dispute shall be taken up by the aggrieved Party under the Grievance and Arbitration procedure provided for herein. Regular employees when available to do their regular work, shall not be replaced at their work by extra or temporary employees.

The Employees, in accordance with their Seniority shall have the right to make a selection of the available work. Any dispute, difference or grievance regarding the interpretation, application, or breach of the provisions of this Agreement, shall be settled by conference with the duly authorized Officials of the Union and a Representative of the Company.

In the event that such dispute, difference or Grievance shall not have been satisfactorily adjusted between the Parties in the manner provided above, then such dispute, difference or Grievance regarding the interpretation, application or breach of the provisions of this Agreement may be submitted to Arbitration at the request of either Party to New Jersey State Board of Mediation, who shall designate an Arbitrator.

The decision of such designated Arbitrator shall be final and binding upon the Parties. The Parties further agree that there

shall be no suspension of work when such dispute, difference or grievance arises and while it is in the process of adjustment or Arbitration. The Parties agree that the expenses of the Arbitrator shall be borne equally between them. The Arbitrator shall decide cases in issue solely upon the provisions of this Agreement, and shall have no power to add to, delete from, modify or alter the provisions of this Agreement.

Any Member of the Union who shall, at the discretion of the Arbitrator be required to testify at or attend any hearings or Arbitration, Mediation or settlement of any question of violations of this Agreement, shall not suffer any loss in Wages by reasons thereof. Only the Union or the Company shall have the right to request Arbitration.

19. CHECK OFF SYSTEM FOR UNION DUES

It is agreed that upon written authorization from the Employee, the Employer will deduct from each Employee, dues and all Initiation Fees that may be due from the Employee to the Union, said deductions to be made the first payroll week in each and every month, whichever comes sooner, and shall forward the same to the Office of the Union together with a list setting forth the name of each Employee and the amount of money that is being remitted on behalf of each. The Union office shall supply such list to the Employer.

20. DELIQUENCY IN PAYMENTS

Where the Company is more than thirty days in arrears in forwarding the Employee's Union dues to the Union or in making payments to the Welfare Fund, or there is a question as to the

number of employees in the employ of the Company entitled to participate in the benefits purchased by the Fund or the amount required to be paid for the Employee's benefit by the Company to the Fund, the Union shall have the right on five days notice to the Employer, to inspect and examine the books of the Company and the failure of the Company to grant such right to the Union shall constitute a breach of this Contract by the Company.

21. DISCHARGE OF EMPLOYEES

No Employee shall be discharged by the Employer except for just and sufficient cause. When an Employee is discharged the Employer shall notify the Union by Registered Mail within five (5) days after the discharge and state the reasons for the discharge. If the Union, in any case, contends that an employee was discharged without just and sufficient cause, then and in that event the validity of said discharge shall be submitted to Arbitration in the manner provided for in Paragraph "18". In the event the Board of Mediation determines that an Employee was discharged without just and sufficiennt [sic] cause, said Employee shall be reinstated with full pay for all time lost by him from work as a result of said discharge.

22. OWNER-OPERATORS

All Union Drivers in the employ of the Employer must be booked before a Lease-Operator, independent Truckmen, or Contractor. In the event that a Lease-Operator, Independent Truckmen or Contractor is booked before a regular Union Driver, then and in that event the Driver will be entitled to a full days pay. This provision includes all work done on Saturday.

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Such Owner Operator or individual Operator shall have the Seniority only as amongst Owner-Operator or individual Operators.

Employers are required to use and shall use their own available equipment and Drivers before hiring or contracting for any extra or additional equipment and no regular employee shall be laid off or discharged while there are any individual Owners or Operators employed by the Employer.

No individual Owner or Operator shall be put to work unless permission is first secured from the Union, which permission may be revoked by the Union at its discretion.

Any Employee laid off, discharged or not working while the Employer has engaged or is using extra or additional equipment which the Employer has hired, contracted for, or leased shall be paid a regular full days pay for every day he has not worked because of, or while the Employer is using or engaging such extra or additional equipment.

A completed list of Owner-Operators and/or Brokers engaged by the Company shall be furnished to the Union upon the execution of this Agreement, and shall be subject to the Terms and Conditions of this Agreement.

23. CONTINUATION OF EMPLOYEE'S BENEFITS

Every Employee shall continue to enjoy any and all Benefits and working conditions heretofore enjoyed by him in connection with or pertaining to his job, and he shall not be deprived thereof as a result of or after the execution of this Agreement, even though such benefits or working conditions are not expressly provided for herein.

Appendix E

Should any provision of this Agreement be held invalid under Federal or State Law or Regulation then such provision shall become null and void by the remaining provisions of this Agreement.

24. PENSION PLAN

Effective November 21, 1980, and for the objects and purposes set forth in a certain Agreement and Declaration of Trust, executed by and between the certain Employers and the Local Union, and any Amendments of Supplements thereto, which is incorporated herein by reference the Fund, shall receive from the Employers of the Egg Industry, Lakewood Area, the sum of TWENTY CENTS (.20¢) per hour, based on a forty hour week; the sum of EIGHT DOLLARS ($8.00) per week for each straight time hour for each Full Time Employee covered by this Agreement.

Effective November 21, 1982 there shall be a fifteen cents (.15¢) increase. The Employer shall pay on November 21, 1982 the sum of THIRTY-FIVE CENTS (.35¢) per hour, based on a forty hour week; the sum of FOURTEEN DOLLARS ($14.00) per week for each straight time hour for each Full Time Employee covered by this Agreement.

The Contributions to the Fund and all accumulations thereon, shall be used to provide for Pension or Retirement Benefits as provided in a Plan selected by the Trustees to the Fund and to be used for such other purposes set forth in this Agreement and Declaration of Trust, governing the Trustees in the Administration of the Pension Fund. No employee shall make or be required to make any Contributions to the Pension Fund. Payment shall be from the first date of employment.

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Trustees in setting up a Pension Plan or Retirement Benefits shall be the sole judges in determining the eligibility requirements and the rights of any Employees thereunder.

The Employer agrees to immediately join and concur with the Union and the Trustees, if necessary, in executing such petitions, applications and forms that are required to be filed with the State Governmental Agencies and agrees to provide such information as the Trustees, Banking Institutions, and Insurance Company may request in connection with the operation of the Pension Fund and Plan.

The Trustees of the Pension Fund or Plan shall have such rights and duties as set forth in the Plan and in the Agreement and Declaration of Trust and any Supplements or Amendments thereto.

It is agreed between the Employer and the Union that should the Employer fail to contribute the sum per straight time hour, for each straight time hour worked for each Employee as required by this section, the Union shall have the right to order a stoppage of the Employees of the Employer and that such a work stoppage shall not be a breach of this Labor Agreement.

If the Employer is deliquent for failure to make contributions due, the Employer shall be obligated to pay all court costs, collection costs, and reasonable Attorney Fees when the Union or the Fund is required to take action to recover the Monies due.

25. TERM OF AGREEMENT

THIS AGREEMENT, shall become effective on the 21ST. DAY OF NOVEMBER, 1983 and shall continue in full force and

effect for a period of three years, expiring on the 21ST DAY OF NOVEMBER 1986, and shall thereafter automatically renew itself for an additional one year period unless either Party gives the other Party at least sixty (60) days notice in writing prior to the date fixed for expiration namely, that said Party does not desire said Contract to automatically renew itself for an additional one year period.

THIS AGREEMENT, shall be binding upon and shall inure to the Benefit of the respective Parties hereto, and to their respective Parties hereto, and to their respective Successors and Assigns.

IN WITNESS WHEREOF, the PARTIES have caused these presents to be duly executed by their respective Officers the day and year first above written.

LOCAL UNION 863, AFFILIATED
WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA.

ATTEST: s/ John Bruder

BY: _____
JOSEPH PECORA
SECRETARY-TREASURER

LAKEWOOD AREA EGG COMPANY

BY: _____
JERSEY COAST EGG COMPANY

ATTEST: _____

No. 85-1313

Supreme Court, U.S.
FILED
MAR 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JERSEY COAST EGG PRODUCERS, INC., a corporation of the State of Delaware,

Petitioner,

vs.

LOCAL UNION NO. 863, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA and DOUGLAS SAMUELS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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John Wiley & Sons v. Livingston, 376 U.S. 543 (1964) 15

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McDonald v. City of West Branch, —— U.S. ——, 104 S. Ct. ——, 80 L. Ed. 2d 302 (1984) 15, 17

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Office of Supply Gov. of Korea v. New York Navigation Co., Inc., 469 F.2d 377 (2d Cir. 1972) 20

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Sidarma Societa Italiana Di Armamento Spa, Venice v. Holt Marine Industries, Inc., 515 F. Supp. 1302 (S.D. N.Y. 1981) 20

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Shearson Hayden Stone, Inc. v. Liang, 493 F. Supp. 104 (W.D. Ill. 1980) 19, 20

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United States v. Agee, 597 F.2d 350 (3d Cir.) (en banc), cert. den., 442 U.S. 944 (1979) 22

United States v. Kwasniewski, 91 F. Supp. 847 (E.D. Mich. 1950) 22

Wilko v. Swan, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953) 16, 19, 20

W.R. Grace & Co. v. Local Union No. 759, Internat'l Union of Rubber Workers, 461 U.S. 757, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983) 15, 16

Village of Valley Stream v. Local 342, 89 A.D. 2d 1016, 454 N.Y.S. 2d 461 (App. Div. 1982) 23, 24

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29 U.S.C. §185 (Section 301 of the Labor Management Relations Act) 2, 4

Other Authorities Cited

F. Elkouri & Elkouri, "How Arbitration Works", (3d ed. 1981) 15

K. Davis, "Administrative Law Text", (3d ed. 1972), §18.02 22

Moore's Federal Practice (2d ed. 1980) §0. 405(1) 18

Restatement of Judgments (1942) §1 18

O. Fairweather, "Practice and Procedure In Labor Arbitration" (2d ed. 1983) 26

No. 85-1313

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JERSEY COAST EGG PRODUCERS, INC., a corporation of the State of Delaware,

Petitioner,

vs.

LOCAL UNION NO. 863, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA and DOUGLAS SAMUELS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

Jersey Coast Egg Producers, Inc., appellee below, has petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. This brief is submitted on behalf of respondents Local 863, International Brotherhood of Team-

sters, Chauffeurs, Warehousemen and Helpers of America and Douglas Samuels in opposition to the petition. In this brief, Jersey Coast Egg Producers, Inc. shall be referred to as "the Company" and Local 863, I.B.T., shall be referred to as "the Union."

Opinions Below

The opinion of the court of appeals is reported at 773 F.2d 530 (3d Cir. 1985) and is set forth in the Company's appendix at Pa1 to Pa19.* The court of appeals denied the Company's petition for a rehearing in banc, and this denial is set forth at Pa41. The opinion of the district court is unreported and is set forth at Pa30 to Pa38.

Jurisdiction

The district court possessed original jurisdiction pursuant to 29 U.S.C. §185 (Section 301 of the Labor Management Relations Act) and pursuant to 9 U.S.C. §§ 9 and 10. The court of appeals possessed jurisdiction pursuant to 28 U.S.C. §1291. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Statutory Provisions

The statutory provisions involved in this matter are 29 U.S.C. §185 and 9 U.S.C. §§9 and 10.

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* "Pa" refers to the petititioner Company's appendix.

Procedural History

This is an appeal from a decision of the United States Court of Appeals for the Third Circuit reversing the decision of the District Court for the District of New Jersey, which had vacated a labor arbitration award. The Circuit Court reinstated the arbitration award.

This case orginiated on March 6, 1984, when the Company discharged Douglas Samuels for allegedly selling one carton of eggs. The Union grieved the discharge. On March 14, 1984 the Company filed a complaint in the Municipal Court of Voorhees Township charging Samuels with theft of eggs, valued at $35.00, in violation of N.J.S.A. 2C:20-3. A non-jury trial on the charge was held on April 9, 1984 in the Voorhees Municipal Court. As a result of the trial, Samuels was found guilty and fined $50.00. No appeal was taken.

In the meantime, the Union's grievance was being processed and arbitration was scheduled for July 26, 1984. On July 12, 1984 the Company moved before the Superior Court of New Jersey, Chancery Division, to restrain the arbitration. On July 24, 1984 the Chancery Division, per Judge Henry R. Wiley, denied the motion. On July 26, 1984 the arbitration was held before Arbitrator J.J. Pierson. On September 11, 1984 the arbitrator issued his Opinion and Award setting aside the discharge (Pa43 to 50). On September 12, 1984 Judge Wiley dismissed the complaint which had been filed by the Company on July 12, 1984.

On September 17, 1984 the Union filed a petition to confirm the award in the United States District Court. On September 18, 1984 the Company filed a motion to vacate the award in the Superior Court of New Jersey, Chancery Division. On October 4, 1984 the Union removed the Company's motion to the United States District Court under 28 U.S.C. §1441, alleging as the federal statutes involved §301 of the Labor Management Relations Act, 29 U.S.C. §185, and 9 U.S.C. §10. On October 19, 1984 the Union's petition to confirm and the Company's (removed) motion to vacate were consolidated before Judge Thompson, U.S.D.J. On October 22, 1984 the Company moved to remand its motion to state court. The Union moved for summary judgment to confirm and the Company moved for summary judgment to vacate the award.

On December 3, 1984 the district court rendered an opinion from the bench (Pa20 to Pa38). That opinion denied the Company's motion to remand granted the Company's motion to vacate, and denied the Union's motion to confirm. The decision was docketed as an Order on December 5, 1984 (Pa39 to Pa40). The Union appealed.

On September 25, 1985 the court of appeals issued its decision reversing the district court's decision (Pa1 to Pa19). On November 7, 1985, the court of appeals in banc, denied the Company's petition for rehearing (Pa41 to Pa42). The Company then petitioned for a writ of certiorari.

Statement of the Case

Douglas Samuels was employed by the Company as a truck driver (Pa44). At the time of his discharge, he had been employed by the Company for 25 years (Pa48). On February 27, 1984 a customer informed the Company that he had observed Samuels take a carton of eggs from his truck and put it in the trunk of a car (Pa45). However, on that day the Company did not show a shortage of eggs (Pa47 to Pa48). Nonetheless, on March 6, 1984 the Company discharged Samuels for theft. The Union grieved.

One week later the Company filed a complaint against Samuels in the Municipal Court of Voorhees Township, charging theft of a case of eggs valued at $35.00 in violation of N.J.S.A. 2C:20-3. Under N.J.S.A. 2C:20-2(b)(3), this is a disorderly persons offense. A non-jury trial was held in the Voorhees Municipal Court in the afternoon of April 9, 1984. Samuels retained and was represented at the trial by an attorney. The Municipal Court found Samuels guilty of the theft and fined him $50.00. Samuels did not appeal.*

The grievance filed by the Union proceeded through the various steps and was scheduled for arbitration on July 26, 1984. On July 12, 1984 the Company moved in state court to restrain the arbitration, but Judge Wiley denied the motion. The arbitration proceeded on July 26, 1984.

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* At oral argument before the district court, counsel for the Union, responding to an inquiry from the court, explained that Samuels, who was represented at the municipal court trial by a criminal attorney, not a labor lawyer, did not appeal because of the insignificant size of the penalty and the large amount of money his attorney advised him was entailed in pursuing an appeal, on top of the amount he already paid for trial (Pa21).

The arbitration was conducted pursuant to the grievance and arbitration clause contained in the collective bargaining agreement in effect between the Union and the Company (Pa51 to Pa70). Section 18 of the contract provides for the grieving of any dispute "concerning the interpretation or application of" the contract (Pa64). If the grievance is not resolved between the parties, the matter may be submitted to final and binding arbitration (Pa64). The contract further states that "[t]he Arbitrator shall decide cases in issue solely upon the provisions of this Agreement, and shall have no power to add to, delete from, modify or alter the provisions of this Agreement." (Pa65). The contract also provides that no employee shall be discharged by the Company "except for just and sufficient cause" (Pa66) and "[i]f the Union, in any case, contends that an employee was discharged without just and sufficient cause, then and in that event the validity of said discharge shall be submitted to arbitration in the manner provided for in Paragraph '18.' " (Pa66). Though the contract does not contain a "Management Rights" provision, the Company adopted a set of work rules. Included among these rules is a section calling for termination for, *inter alia,* stealing from the Company or its customers.

The arbitration of this case was by a full hearing into all of the facts surrounding the discharge. The Company called Irwin Moody, its controller and assistant general manager, and Steven Hartman, the associate supervisor of Acme Markets, who had reported the theft to the Company. The Union called John Braden, business agent of the Union, and Douglas Samuels, the discharged employee. During the testimony of the witnesses there was no discussion of res judicata, collateral estoppel, or any theory

of preclusive effects of a conviction. However, in its opening statement the Company did state Samuels had been convicted in municipal court and that the municipal conviction should "control." The Company provided the arbitrator with a copy of the transcript of the municipal court proceeding.

At no point in the arbitration did anyone, Union, Company or arbitrator, ever mention the words res judicata or collateral estoppel. There was no discussion or explanation of res judicata or collateral estoppel. The arbitrator never discussed those doctrines at all. No post hearing briefs were submitted.

The arbitrator set aside the discharge. In his award, issued September 11, 1984, the arbitrator began by noting that the Company had the burden of persuasion as to just and sufficient cause for the termination (Pa47). The arbitrator also observed that his function was to review the facts before him, weight the evidence, and assess the credibility of the witnesses (Pa47). Evaluating the record before him, the arbitrator concluded that the testimony of the customer who supposedly observed the theft was not entirely credible (Pa47 to Pa48). For example, even though the witness claimed the sale of eggs was made directly in front of him, he did not take down the license plate of the car into which the case of eggs was putatively placed and did not check the delivery to see if a case were missing (Pa47 to Pa48). Also, the arbitrator wondered why Samuels would sell a case of eggs at the customer's location in clear view of the customer (Pa47). Finally, the arbitrator found it difficult to determine exactly what, if anything, was stolen in light of the fact that no shortage was discovered (Pa48).

The arbitrator emphasized that his role is to judge the discharge based upon his authority under, and the standards imposed by, the collective bargaining agreement. Based upon the facts before him, the arbitrator concluded that the Company's March 6 discharge of Samuels was not for just and sufficient cause. As the arbitrator summarized:

> The employer, when contending that an employee has stolen or committed theft, must support that allegation of proof of loss. Herein, there was no proof of loss. Moreover, when considering that Mr. Samuels had spent over twenty-five years in the employ of the Company, there should have been produced more than a vague identification, specifically a definite description, of what was stolen. Without such, it is impossible for this Arbitrator to sustain a discharge on unconvincing identifications or a misdemeanor conviction.
>
> Based on the evidence presented, this Arbitrator has not been convinced that the Grievant did commit the act of theft on February 27, 1984. As such, based on this finding, this Arbitrator must hold that the Grievant did not violate the Company rule in paragarph 13 *and* that there was no just or sufficient cause for the discharge of the Grievant.

(Pa48 to Pa49). (Emphasis in original.)

The Union then moved in federal court to confirm the award and the Company moved in state court to vacate it. After the Company's motion was removed to federal court, the parties' motions were consolidated for consideration on cross-motions for summary judgment before

Judge Thompson, U.S.D.J. On December 3, 1984 the district court read its opinion.

The district court acknowledged that it was the arbitrator's award that was bargained for and that errors in law or fact by an arbitrator do not justify vacating the award (Pa34). Rather, noted the district court, there must be a "perverse misconstruction of the law in order to vacate an award." (Pa34). In order to overturn the award, it must first be concluded that the arbitrator erred as a matter of law, and second that the error "was in manifest disregard of the law" (Pa35). The district court then found that it was an error of law for the arbitrator to allow the relitigation of the theft. The district court observed that "the arbitrator was made aware of the conviction for theft in Municipal Court" and of the Company's rule against theft. In light of this, the district court concluded that the arbitrator's failure to give "dispositive" effect to the conviction was a "perverse misconstruction of the law." (Pa37).

For these reasons the district court granted the Company's motion to vacate the award and denied the Union's motion to confirm. An Order reflecting this decision was entered on December 5, 1985 (Pa39). The Union and Samuels appealed.

The Court of Appeals for the Third Circuit reversed, by a two to one decision, the decision of the district court. After fully reciting the relevant facts, including the fact that the Company discharged Samuels one month before he was found guilty in municipal court, the circuit court emphasized that it was the arbitrator's decision that the parties bargained for in their labor contract, not the de-

cision of some outside source. Thus the circuit court, citing Supreme Court decisions, noted that parties to a collective bargaining agreement choose to have disputes resolved by an arbitrator, that a court must defer to the arbitrator's award and may not substitute its own view, and that a court may not disturb an award for error of law (Pa5).

The circuit court explained that these parties had a collective bargaining agreement which provided for arbitration of all disputes and which further provided that discharges must be for "just and sufficient" cause. The arbitrator, carefully weighing and reviewing the evidence, concluded that the discharge was not for just and sufficient cause pursuant to the contract, but the district court set aside this award for manifest disregard of the law because the arbitrator declined to accord dispositive effect to the municipal court conviction. Without deciding whether collateral estoppel would apply to an arbitration (though suggesting in a footnote that it might not), the circuit court ruled that it was within the arbitrator's purview to determine the impact of the judicial finding in the collective bargaining relationship, and that a court may not superimpose its own views onto the arbitrator (Pa8). Thus the circuit court stated that:

> it remains the decision of the arbitrator, and the arbitrator alone, whether the misdemeanor conviction constitutes just cause for the dismissal under the terms of the collective bargaining agreement.

(Pa9).

Observing that the discharge occurred one month before the conviction, that the Company (according to the arbitrator) failed to prove any loss of product, that Samuels

was a 25-year employee, the appellate court remarked that it was for the arbitrator—not the court—to interprete the contract's "just and sufficient cause" requirement. Accordingly, it was a permissible interpretation of the award to say, under the facts of this case, that the misdemeanor conviction was not dispositive of just and sufficient cause for dismissal (Pa11). Therefore, the district court's vacatur of the award was in improper imposition of its views upon the arbitrator. As the circuit court summerized:

> The short answer to [the employers] contentions is that [it] agreed to leave to an arbitrator the resolution of disputes whether [just] cause existed for the discharge of any employee represented by [the union]. The arbitrator has ruled, and [the employer] is bound by that award.

(Pa12) (quoting from *Mobil Oil Corp.* v. *Independent Oil Workers Union,* 679 F.2d 299, 304 (3d Cir. 1982) (brackets as in decision).

In a concurring opinion, Judge Stapleton emphasized that the arbitrator correctly understood that the parties bargained for his decision as to whether the employee's conduct constituted just and sufficient cause for discharge under the contract (Pa12 to Pa13). Given that the contract called for an arbitral, rather than judicial, resolution of discharge issues, "it cannot be said that this interpretation of the arbitrator failed to draw 'its essence from the collective bargaining agreement.'" (Pa13).

Judge Aldisert dissented. Judge Aldisert opined that a municipal court conviction would be binding upon any

federal or state judge, including a justice of the United States Supreme Court, and therefore it should also be binding upon an arbitrator. Judge Aldisert stated that the conviction did not involve an area or issue requiring specialized knowledge of labor or experience in the law of the workplace. Accordingly, Judge Aldisert would require the arbitrator to follow the municipal court finding of guilt. Since the arbitrator acknowledged that theft constitutes a basis for discharge, the arbitration award (which reinstated the employee) must be vacated.

After the circuit court issued its decision reversing the district court and reinstating the award, the Company moved for rehearing before the full court. The full court denied this request, and an order on the mandate issued. The Company then filed a petition for writ of certiorari.

It is the respondent's position that this case does not present any novel theory of law requiring this Court's review; nor does this decision concern any issue of public import. This is simply another labor arbitration case in which the question is whether an arbitrator's charge is to construe and apply the collective bargaining agreement in effect between the parties or to add to that private contract the external laws of the legislatures and courts. As this Court has stated before, labor arbitrators are assigned to interpret the contract pursuant to which they were selected, and they are not chosen to enforce or apply external laws. For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARGUMENT

The Court should deny the Company's petition for a writ of certiorari because the Court of Appeals below correctly ruled that in labor arbitrations the parties bargained for a decision by the arbitrator under the collective bargaining agreement, and the decision as to what weight, if any, should be given to a municipal court judgment was for the arbitrator to decide, not a court; in this case the arbitrator's decision drew its essence from the contract based upon the evidence he heard, and his refusal to accord dispositive effect to the municipal court judgment was not manifest disregard of the law nor contrary to public policy.

Arbitration is intended to be the ready mechanism whereby labor disputes are resolved rapidly, informally, and economically by an arbitrator selected by the parties to the contract. In this case the contract provides for arbitration of all disputes, requires just and sufficient cause for discharge, and directs that the arbitrator decide the matter based solely upon the contract. Even though the arbitrator followed this contractual mandate and found no just and sufficient cause for the discharge of a 25-year employee, the award has been dragged through the courts. The result is that a March 1984 discharge, set aside by a September 1984 arbitration award, remains in the judicial sphere two years later, at enormous expense to all involved. Throughout it all, the Company's constant plea has been that the award it bargained for in its contract should be set aside, not because it contravenes the contract but because it differs from a decision by a municipal court judge. The court of appeals rightly eschewed that proposition.

As the Third Circuit correctly ruled, the parties agreed to a decision by an arbitrator who would rule under the contract, and it was for the arbitrator to assess just and sufficient cause and to determine what weight, if any, to accord to the findings of an external entity unrelated to the contract. This is not a novel proposition. Rather, it is fully consistent with this Court's repeated statements that arbitrations are not judicial proceedings and are not bound by external laws or judicial orders, that arbitrators have exclusive authority to determine issues such as burdens of proof and evidential rulings, and that courts should decline to review the merits of an award or superimpose their own views.

Any analysis of arbitration and arbitration awards must begin with recognition of its legislative authorization as the mechanism for final resolution of labor disputes. The Congress has legislated that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." Labor Management Relations Act, 29 U.S.C. §173(d). Consistent with this legislative mandate, this Court has emphasized that a labor arbitrator's award is legitimate only when it draws its essence from the contract, for she is "confined to interpretation and application of the collective bargaining agreement." *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 3 L. Ed. 2d 1424 (1960). If the arbitrator looks beyond the contract to outside sources, she exceeds the scope of the submission and her authority, and the award will not be enforced. *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S.

728, 744, 101 S. Ct. 1437, 67 L. Ed. 2d (1981); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 53, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974); *Enterprise Wheel & Car Corp.*, 363 U.S. at 597. As this Court explained:

> [A] proper concept of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obligated to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective bargaining agreement.

Gardner-Denver Co., 415 at 52 n.16 (quoting from the Harvard Law Review). More recently, this Court noted that arbitration awards are not judicial proceedings subject to the mandate of 28 U.S.C. §1738. *McDonald* v. *City of West Branch*, —— U.S. ——, 104 S. Ct. ——, 80 L. Ed. 2d 302, 307 (1984). In sum, labor arbitration is a congressionally authorized, self-contained, non-judicial system of resolving disputes in the workplace in an informal and expeditious manner based upon the parties' contract and the law of the shop. *Gardner-Denver Co.*, 415 U.S. at 58; F. Elkouri & Elkouri, *How Arbitration Works*, (3d ed. 1981) at 2-4. See also *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 550 (1964). The parties bargained for a decision by the arbitrator under the collective bargaining agreement, not for a decision imposed by some outside source, even if that source is a court. *W.R. Grace & Co.* v. *Local Union No. 759, Internat'l Union of Rubber Work-*

ers, 461 U.S. 757, 103 S. Ct. 2177, 76 L. Ed. 2d 298, 306 (1983).

Not only (and perhaps because of) arbitrations' non-judicial origination in the private agreement of the parties, the courts have refused to impose on arbitrations the rules and procedures which mark judicial and quasi-judicial fora. Thus an arbitration award may be made without any explanation of reasons for the award. *Enterprise Wheel & Car Co.*, 363 U.S. at 598; *Wilko* v. *Swan*, 346 U.S. 427, 436, 74 S. Ct. 182, 98 L. Ed. 168 (1953). The arbitrator's concept of statutory requirements such as burden of proof, material fact, and the like cannot be reviewed. *Id.* Judicial doctrines such as election of remedies do not apply, and discovery, cross-examination, and testimony under oath are often unavailable. *Gardner-Denver Co.*, 415 U.S. at 49-51, 57-58.

It is clear that labor arbitrations are wholy outside the realm of judicial fora. The parties to a labor agreement have not contracted for the rule of some statute nor for the decision of a judge. They have bargained for an award by a mutually agreed upon arbitrator under and in accordance with a private contract, nothing more. Indeed, anything more would be contrary to the parties' agreement, except if they expressly provide otherwise in their agreement.*

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* There are contracts which contain express provisions allowing or requiring the incorporation of external sources of law, thereby rendering those outside sources applicable in an arbitration. See *W.R. Grace*, 76 L. Ed. 2d at 306 n.8. However, the contract here does not contain any such provision. On the contrary, it expressly limits the arbitrator to the contract (Pa65).

In the instant case the parties received exactly what they bargained for: a determination under the contract by the arbitrator as to whether just and sufficient cause for the discharge existed. The arbitrator heard all of the testimony, reviewed the evidence (including the municipal court transcript and conviction), and ruled that just and sufficient cause for discharge did not exist. The award draws its entire essence from the contract, and for that reason should not be disturbed by the judiciary. In recognizing and applying this fundamental proposition of law, the Third Circuit was merely enforcing the standard established by this Court. *Enterprise Wheel & Car Co.*, 363 U.S. at 597. The Third Circuit's decision does not warrant review.

The dissent below complained that if a municipal court conviction could bind a Supreme Court justice, surely it would bind an arbitrator. Posed in this manner, the dissent's complaint has visceral impact, but upon more reasoned examination it fails. The ultimately dispositive fact is that an arbitration is not a judicial proceeding. *McDonald*, 80 L. Ed. 2d at 307. It is a private dispute-resolution system wholly separate from any judicial network and not encumbered by the rules and procedures of judicial or quasi-judicial proceedings. To remark that a Supreme Court justice might be bound by a lower court decision while an arbitrator is not does not demean the justice, for the justice is part of the judicial system while the arbitrator is not. As this Court has noted again and again, arbitrators, unlike judges or justices, are commonly not lawyers, and they hear cases commonly prepared and presented by non-lawyers. *McDonald*, 80 L. Ed. 2d at 308 n.9; *Barrentine*, 450 U.S. at 743; *Gardner-Denver Co.*, 415

U.S. at 57 n.18 See also *Newark Stereotypers' Union No. 18* v. *Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir. 1968).

That arbitrators are frequently not attorneys raises a practical reason for not requiring the application of collateral estoppel to arbitration. Res judicata and collateral estoppel are judicially created common law doctrines whereby the same parties who litigate a claim in one court of competent jurisdiction may be barred from litigating that same claim, or an issue contained therein, in a subsequent court. Restatement of Judgments, §1 (1942); *Moore's Federal Practice*, §0. 405(1) (2d ed. 1980). In order for these preclusive doctrines to apply, there must be an identity of parties (or their privies), causes of action, and issues, and they apply only if the claim or issue was distinctly litigated and directly determined contrary to the party against whom the preclusion is asserted. *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church* v. *New Jersey State Board of Higher Education*, 654 F.2d 868, 876 (3d Cir. 1981). Determination of these prerequisites is often difficult enough for a court; the prospect of arbitrators having to grapple with these legal intricacies is frightening, and contrary to the informality and speed which should be the earmarks of arbitrations. Clearly it is best that arbitrators be left alone to hear and resolve cases solely under the contract, without the interdiction of judicial doctrines.

For all of the foregoing legal and practical reasons, the ruling and reasoning of the Third Circuit was correct: it is for the arbitrator to determine just and sufficient cause under the contract, and to assess how much weight, if any, should be accorded the municipal court conviction.

This arbitrator made his determination under the contract, and the parties should be bound by that award (Pa12).

However, even if this Court concludes that it was an error of law for the arbitrator to decline to accord dispositive effect to the municipal finding, that error does not warrant reversal of the award, for two reasons. First, an arbitration award may not be vacated for error of law but only for manifest disregard of the law, which did not occur here. Second, collateral estoppel is not an immutable doctrine of law uniformily applied in the arbitral setting; numerous court decisions reveal it to be a judicial creation subject to discretion, and arbitrators and courts have declined to apply it in arbitrations. Conversely, there are no decisions holding that an arbitrator must be bound by collateral estoppel. Consequently, this arbitrator's decision cannot be deemed to be in manifest disregard of the law. These two propositions will be elaborated upon here.

As the district and circuit courts below noted, an arbitration award may be overturned for manifest disregard of the law. See *Wilko,* 346 U.S. at 436-37. Manifest disregard of the law "must be something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand and apply the law." *San Martine Compania De Nav.* v. *Saguenay Term. Ltd.,* 293 F.2d 796, 801 (9th Cir. 1961). In order to vacate an award on the ground of manifest disregard, the complaining party must establish that the arbitrator understood and correctly stated the law but proceeded to ignore it. *San Martine Compania,* 293 F.2d at 801; *Fairchild & Co., Inc.* v. *Richmond, Fredericksburg & Potomac R. Co.,* 516 F. Supp. 1305, 1315 (D.D.C. 1981); *Shearson Hayden Store, Inc.*

v. *Liang*, 493 F. Supp. 104, 108 (W.D. Ill. 1980); *Bell Aerospace Co.* v. *Local 516, United Automobile Workers*, 356 F. Supp. 354, 356 (W.D. N.Y. 1973); *Fukaya Trading Co.* v. *Eastern Marine Corp.*, 322 F. Supp. 278 (D. La. 1971). Moreover, this basis for upsetting an award is "severely limited." *Office of Supply Gov. of Korea* v. *New York Navigation Co., Inc.*, 469 F.2d 377, 380 (2d Cir. 1972); *Saxis Steamship Co.* v. *Multifacs Internat'l Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967); *Sidarma Societa Italiana Di Armamento Spa, Venice* v. *Holt Marine Industries, Inc.*, 515 F. Supp. 1302, 1306 (S.D. N.Y. 1981).*

Thus an arbitrator's award is in manifest disregard of the law only where the party seeking its vacatur establishes that the arbitrator understood and correctly stated the law but proceeded to disregard his own pronouncement. Yet there is no indication anywhere in the record that any of the requirements of this extremely narrow exception were met here. They were not.

At the arbitration there was only passing reference to, and absolutely no explanation of, the notion that the municipal court conviction was controlling. Counsel for the Company asserted that the state judge who refused to enjoin the arbitration expressed his belief that the arbitrator would have to adhere to the municipal conviction, but counsel for the Union correctly pointed out that that issue was never before the state judge, was never briefed

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* The "manifest disregard" exception to judicial deference to arbitration suggested in *Wilko* arose in the context of a commercial arbitration. However, as Third Circuit has observed, there should be even greater judicial deference to a labor award. *Ludwig Honold Mfg. Co.* v. *Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969).

to or decided by him, and that any such statements made by the judge were his own feelings. In any event, that judge noted that it would be up to the arbitrator to decide what weight to give the municipal conviction.* As to the law surrounding or defining res judicata or collateral estoppel and/or their application to arbitrations, *not one word was said by either party.* A review of the entire transcript of the arbitration shows that neither the phrase nor concept, no less the law of, "collateral estoppel" or "res judicata" was ever mentioned by anyone. There were no post-hearing briefs.

The district court did not find that the arbitrator understood and correctly stated the law but ignored it. Indeed, the district court appeared unconcerned with the arbitrator's actual knowledge of the law. Instead, the district court simply stated that the arbitrator knew of the municipal court conviction and should have given it dispositive effect. Rather than examine whether the arbitrator understood and correctly stated the law but ignored it, the district court superimposed on the arbitrator full knowledge of and familiarity with the doctrine of collateral estoppel and then set aside his award for failing to apply that doctrine.

This is not the appropriate methodology or test. In order to find manifest disregard of the law, a court would

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* The Company persists in relying upon a statement made by the state court judge, Judge Wiley, when he denied the Company's motion to restrain arbitration. In dictum, Judge Wiley stated that his own "belief" is that once a court makes a fact determination, whether it be made by a magistrate or state court judge, that would be "the law of the case." But Judge Wiley added that "I think the arbitrator ought to determine these questions" and he declined to restrain the arbitration.

be obligated to first determine if the arbitrator knew the law but acted contrary to his knowledge; not whether he should have known and understood the law. Plainly stated, the arbitrator here did not act in manifest disregard of the law.

Perhaps more important, res judicata and collateral estoppel are not immutable principles of law which must always be applied. For example, under a variety of circumstances courts have refused to apply them in situations where it would not disserve the principle of finality. See, e.g. *Crooker* v. *United States*, 620 F.2d 313 (1st Cir.), *cert. den.*, 449 U.S. 857 (1980); *United States* v. *Agee*, 597 F.2d 350, 360 (3d Cir.) (*en banc*), *cert. den.*, 442 U.S. 944 (1979); *Garner* v. *Grarusso*, 571 F.2d 1330, 1336 (5th Cir. 1978); *Tipler* v. *Du Pont de Nemours & Co.*, 443 F.2d 125, 128 (6th Cir. 1971); *United States* v. *Kwasniewski*, 91 F. Supp. 847, 851 (E.D. Mich. 1950). See also K. Davis, *Administrative Law Text*, §18.02 (3d ed. 1972).

Illustrative of the limitations on the breadth of res judicata/collateral estoppel's application is a recent decision of New York's highest court. *Gilberg* v. *Barbieri*, 53 N.Y. 2d 285, 441 N.Y.S. 2d 49, 423 N.E. 2d 807 (Ct. of App. 1981). In *Gilberg* the plaintiff and defendant were involved in a scuffle. The plaintiff filed a complaint against defendant, charging violation of §240.25 of New York's penal laws, which is a petty offense. A non-jury trial was held in City Court, Mt. Vernon, New York, and defendant was found guilty. The plaintiff then filed a civil suit for assault and moved for summary judgment on liability, based on the criminal conviction. The trial and appellate court granted the motion, noting that the defendant had a full and fair opportunity to litigate the matter and that

collateral estoppel pertained. The Court of Appeals reversed. The Court stated that the determination when collateral estoppel should apply cannot be reduced to a simple formula; the issue is not whether the prior judicial proceeding was flawed, but whether it should be given conclusive effect. *Id.* 441 N.Y.S. 2d at 51. The determination should be based upon the "realities of litigation," including the size of the penalty, the prior forum, the quality of counsel, and differences in law. *Id.**

Moreover, there are judicial and arbitral decisions holding that res judicata and collateral estoppel do not apply to an arbitration. For example, in *Village of Valley Stream* v. *Local 342*, 89 A.D. 2d 1016, 454 N.Y.S. 2d 461 (App. Div. 1982), an employee of the Village/employer was arrested on and pled guilty to charges of sexual abuse,

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* Interestingly, the court remarked that to unhesitatingly accord collateral estoppel effect to municipal court convictions could lead to the unwanted result of plaintiffs bringing criminal charges before instituting civil suits with the hope of obtaining a conviction and then marching into civil court and quickly moving for summary judgment. If these plaintiffs lose in criminal court they suffer no harm, for they were not party to the criminal suit and the standard of proof in the civil matter is lower, making a criminal acquittal less fatal than a conviction would be for a defendant. *Id.* at 52 It is not difficult to imagine the same scenario employed by companies in a labor setting. The rush to bring criminal charges and have the state prosecute the case would be too inviting to pass up, especially if a conviction meant a shortened and sure victory at arbitration and an acquittal means nothing at all. The instant case may well be an example of this very scheme. But this Court need not concur with the New York court's fears of abuse of the criminal court system. The mere existence of the *Gilberg* decision undermines the notion that the arbitrator manifestly disregarded the law in declining to give collateral estoppel effect to a municipal court conviction for a disorderly person's offense.

a first-degree felony, and served 60 days in prison with five years probation. After he pled, the employer fired him and the employee grieved. While the grievance was proceeding through the various steps on its route to arbitration, the employee filed for unemployment benefits with the state agency. A full hearing was held on the unemployment benefits claim and an Administrative Law Judge ruled that the employee had violated the employer's work rules, and he was denied benefits. At the subsequent arbitration of the discharge, the employer submitted the unemployment agency's decision as conclusive on the issue of the violation of the work rules. Nonetheless the arbitrator ruled in favor of the employee.

The Appellate Division upheld the arbitrator's decision over the assertion that the agency's decision was dispositive of the violation of the work rule. Refusing to give the agency decision conclusive effect, the court explained:

> In the within case, we are concerned with an arbitration proceeding pursuant to the provisions of a collective bargaining agreement, and it is conceded that the grievance was within the scope of the arbitration clause of such agreement. Accordingly, the question of the res judicata effect of the Unemployment Insurance Administrative Law Judge was properly for the arbitrator.

Vallage of Valley Stream, 454 N.Y.S. 2d at 462. Accord, *Application of Citizens of Day Care Center, Inc.* v. *Community Social Agency Employees Union,* 59 A.D. 845, 399 N.Y.S. 2d 10, 11 (App. Div. 1977). See also *Auxilliary Power Corp.* v. *Eckhardt & Co.,* 266 F. Supp. 1020, 1023

(S.D. N.Y. 1966) ("[T]he question what effect should be given the German [decision] is a question of interpretation committed to the arbitrator.").

In addition, there are numerous arbitral decisions which refuse to accord conclusive effect to criminal convictions. For example, in *Aldens Inc.*, 61 LA (BNA) 663, 665 (1973) the arbitrator, stressing the distinction between arbitration and a court, stated:

> No criminal proceeding may be submited to an Arbitrator whose selection and whose authority is derived solely from the provisions of a collective bargaining agreement. A penalty for engaging in a crime and/or a fine are prescribed by statute or ordinance. In a criminal proceeding the issue is whether an individual has violated a specific law. And if found guilty, he is punished as directed by law. Only courts of law, established and operating under statutes and ordinances, have the right to determine the innocence or guilt of an individual and to mete out the appropriate penalty.
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> An arbitration proceeding involves an alleged violation of one or more contractual provisions, the interpretation and application of these provisions, the alleged violation of a long established and accepted practice or any act arising out of the employer-employee relationship. And this is true in an issue of employee termination.
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> * * *
>
> *Even an employee discharged for theft is entitled to have his grievance considered in an arbitration proceeding whether he was found innocent or guilty*

> *for the same offense by a Criminal Court. An Arbitrator is not bound by the judgment in a criminal proceeding or by an administrative agency. See Kennicott Copper Co.,* 38 LA 93, *ITT Continental Baking Co.,* 72 ARB para. 8490, and *Sperry Rand Corporation,* 72-2 ARB parap. 8568. Whether an employee was discharged for just and proper cause is a matter to be decided from the nature of employee-employer relationship from contract provisions, from proper rules of conduct and from established and accepted areas. (Emphasis added).

Similarly, in *ITT Continental Baking Co.*, 72-2 ARB (CCH) ¶8490 (1972) at 4700, the arbitrator stated that "an Arbitrator who considers a case should not be bound by a judgment of conviction or acquittal, or for that matter, a determination by an administrative body, in deciding the case before him. [citation omitted]."

Again, in an unreported arbitration decision published in a basic text on arbitration, O. Fairweather, *Practice and Procedure In Labor Arbitration* (2d ed. 1983), at 271-72, the arbitrator stated:

> the Court of Special Sessions made its findings under the criminal code . . . The arbitrator must make his findings under the contract and within the rules of the forum over which he presides. He cannot be limited to the acceptance of the court's holding or acquittal as dispositive of the issues before him. It can well be that one may not be guilty of a crime and yet have conducted himself in a manner that has given sufficient cause for discharge under the collective bargaining greement. *There can be*

> *situations of conviction of criminal conduct which may not be sufficient to justify sustaining a dismissal under a collective contract. The company in the former and the collective bargaining representative in the latter cannot be denied the opportunity to present its own case in arbitration and as a matter of contract application under the criteria agreed upon by the parties.* (Emphasis added).

The foregoing judicial and arbitral decisions all stand for the proposition that a judicial or quasi-judicial decision need not, as a matter of law, be given collateral estoppel or res judicata effect in an arbitration. Nonetheless, the Company argues that the arbitrator acted in manifest disregard of the law when he failed to give conclusive effect to the municipal court conviction. This is simply not supported by the case law. Though collateral estoppel may be central to the Company's legal iconography, the existing law plainly does not preclude the arbitrator from according the criminal conviction whatever weight or effect he deems appropriate.

The district court cited only one case in support of its conclusion that the arbitrator must give dispositive effect to the municipal conviction, and that was *Dickinson* v. *Heinhold Securities, Inc.*, 661 F.2d 641, 644 (7th Cir. 1981). That case is hardly convincing for that proposition. In *Dickinson* the plaintiff and defendant brokerage firm had an agreement, containing an arbitration clause, allowing defendant to trade stocks for plaintiff. Plaintiff claimed violations of the agreement, the defendant sought arbitration, and the plaintiff filed suit in federal court alleging violations of federal securities laws, misrepresentation, and tort and contract claims. The district court denied a

request for a stay of the court proceeding pending arbitration and instead ruled that it would decide all claims, both the non-arbitrable and the arbitrable. The circuit court reversed for various reasons, only one of which is relevant here. The circuit court noted that one predicate for the decision below was the (now defunct) "doctrine of interwining" under which a court faced with arbitrable and non-arbitrable claims which are inextricably entwined decided all of the issues and denied arbitration. The circuit court stated that arbitration could proceed and that the duplication of hearings was tolerable. As to this latter factor, the court obliquely observed that where there is inextricable intertwining permeating the federal suit, the court could make explicit and detailed findings of fact which may be used in a subsequent arbitration between those same parties. *Id.* at 644. But this is hardly support for the conclusion that a municipal court trial for a disorderly person's offense between the state and an employee *must* be given dispositive in a subsequent labor arbitration between the union and employer. Moreover, one must approach the reasoning in *Dickinson* regarding the relationship between a court proceeding and arbitration with extreme caution in light of this Court's recent rulings. See *Dean Witter Reynolds Inc.* v. *Byrd*, 53 U.S.L.W. 4222 4224 and n.9 (Sup. Ct. March 4, 1985).

Nor do the cases cited in *Dickinson* support the idea that an arbitrator must give dispositive effect to a court decision. In *Stockwell* v. *Reynolds*, 252 F. Supp. 215, 220 (S.D.N.Y. 1965) the court noted that a federal court trial would "doubtless" have "bearing on the subsequent arbitration. In *New York Ass'n For Retarded Children* v. *Carey*, 456 F. Supp. 85, 96 (E.D.N.Y. 1978) the court ruled that the parties to a labor contract bar-

gained for a decision by the arbitrator, not a court, despite some New York cases holding that an arbitration award has collateral estoppel effect on a subsequent civil action brought by the same party as in the prior arbitration. In *Buffalo Forge Co.* v. *United Steelworkers,* 428 U.S. 397, 412, 96 S. Ct. 3141, 49 L. Ed. 2d 1022 (1976) the issue was whether one party to a labor contract with an arbitration cause could obtain an injunction rather than arbitrate. The Court answered this in the negative, emphasizing that the parties contracted to arbitrate, not litigate. The parties "have not contracted for a judicial preview of the facts and law." 428 U.S. at 411. In the sentence most helpful to the Company here, the Court frowned upon judicial interpretation of contracts, for they might differ from the arbitrator's interpretation and the arbitrator might be heavily influenced or wholly pre-empted by the court proceedings on the injunction. *Id.* 428 U.S. at 412. Again, this remark does not rise to the level of a conclusion that an arbitrator must give dispositive effect to a municipal court conviction. Indeed, the remark was made in the context of a desire to retain the independence of the arbitrators.

Even if these cases do provide some vague support for the Company's theory, they are more than counterbalanced by the judicial and arbitral decisions cited above which unambiguously hold that a labor arbitrator is *not* bound by the prior conviction. The best that can be said for the Company's position is that it may have inferential foundation in some cases, though it is manifestly contrary to several judicial and arbitral decisions. But this hardly justifies the vacatur of the award as in "manifest disregard of the law." Giving the Comany every benefit of the doubt, there is simply no avoiding the conclusion that the

Company's perception of collateral estoppel and its relation to arbitration is but one of several. That does not warrant either the retroactive superimposition of this doctrine on the award or its vacatur for manifest disregard of the law.

Paraphrasing the Third Circuit, the Company got what it agreed to in its contract—an award by an arbitrator selected pursuant to, and charged with determining just cause under, that contract. The award in this case correctly draws its essence from the contract and was therefore properly upheld by the circuit court. The Company's effort to replace the arbitrator's award with a judicial determination is contrary to the law surrounding and philosophy of labor arbitrations. In any case, the foregoing judicial and arbitral decisions make plain that the arbitrator's treatment of the municipal court conviction was not in manifest disregard of the law.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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